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IN THE

Supreme Court of the United States

No. 76-948

RUTH C. LEIB, FRANK B. LEIB, ANDREW YENCHKO, MARY K. YENCHKO, CLETUS P. LYMAN, ESQ., and RICHARD A. ASH, ESQ.,
Petitioners,

v.

20TH CENTURY CORPORATION, JAMES C. ROBERTSON, ROBERT NELSON, ROBERT DI STEFANO, ALLEN C. SPANGLER, A. C. MURPHY, SHERNO RESEARCH CENTER, INC., GOLDCHIP FUNDING COMPANY, and COSMOPOLITAN INVESTORS FUNDING COMPANY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners Ruth C. Leib, Frank B. Leib, Andrew Yenchko, Mary K. Yenchko, Cletus P. Lyman, Esq., and Richard A. Ash, Esq., pray that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the Third Circuit, rendered in these proceedings on July 14, 1976.

Opinions, Orders, and Judgments Below

On December 5, 1974, Judge Muir of the United States District Court for the Middle District of Pennsylvania orally denied an oral motion that he recuse himself. On December

19, 1974, the district judge denied a written motion that he recuse himself, with opinion. The opinion is not reported, but is reproduced as Appendix L, hereto. On March 28, 1975, the district court entered judgment, awarding attorney petitioners $3,000 in fees and $6,256.72, as reimbursement of expenses, and awarding plaintiff petitioners a total of $460.00 as reimbursement of expenses. The 79-page opinion is unreported but is reproduced as Appendix K, hereto. On June 18, 1975, the district judge entered an order denying attorney petitioners' motion that his opinion of March 28, 1975, not be published at least pending appeal and ordering that it be published by West Publishing Company. The order is reproduced as Appendix H, hereto. On July 11, 1975, the United States Court of Appeals for the Third Circuit entered an order, without opinion, staying publication of the district judge's opinion, pending final disposition of attorney petitioners' appeal from the district judge's order of June 18, 1975. The order is reproduced as Appendix G, hereto. On July 14, 1976, the Court of Appeals entered judgment, modifying the judgment of the district court of March 28, 1975, by increasing the amount of the fee awarded to attorney petitioners to $15,400, and affirming the judgment of March 28, 1974, in other respects. The judgment was accompanied by an opinion, which is not reported but is reproduced as Appendix F, hereto. The opinion of the Court of Appeals directed that the opinion of the district court of March 28, 1975, be restricted to counsel, the district court, and the Disciplinary Board of the Supreme Court of Pennsylvania, pending further order of the court, and that counsel preserve the confidentiality of both the district court opinion and the Court of Appeals opinion, pending further order of the Court of Appeals. On July 14, 1976, the Court of Appeals entered an order impounding its own opinion of that date until further order of the Court. The order is reproduced as Appendix E, hereto. On July 14, 1976, the district judge impounded his opinion of March 28, 1975, pending further order of the court. The order is reproduced as Appendix D, hereto. On August 26, 1976, the Court of Appeals denied attorney petitioners' petition for rehearing. The order is reproduced as Appendix B, hereto. On September 29, 1976, the Court of Appeals denied attorney petitioners' application for modification of its opinion and mandate, without opinion. The order is reproduced as Appendix A, hereto.

Jurisdiction

The Court of Appeals entered judgment modifying, in part, and affirming, in part, the district court, on July 14, 1976. The Court of Appeals, by order of July 29, 1976 [reproduced as Appendix C, hereto], enlarged the time in which to file a petition for rehearing through August 17, 1976. A timely petition for rehearing was filed on August 17, 1976, and was denied by order of August 26, 1976 [Appendix B, hereto].

The jurisdiction of this court is invoked under Title 28 U.S.C. § 1254(1), granting jurisdiction to this court to review by writ of certiorari cases in the courts of appeal upon petition of any party.

Questions Presented

1. Did the Court of Appeals err (1) in holding that attorneys petitioning for awards of counsel fees and expenses under the "common benefit" principle were not entitled to a disinterested judge and (2) in approving the judge's assumption of the role of "guardian" of shareholders of a corporate party adverse to petitioners, even though the cor-

poration was represented by counsel, vigorously opposing such awards?

2. Did the Court of Appeals err in deferring to the findings of fact and assessments of credibility of the district judge, pursuant to F.R.C.P. 52(a), and to his other subjective determinations where:

(a) the judge showed bias and hostility toward attorney petitioners?

(b) the judge defamed them by making erroneous "findings" of fraud and unethical conduct, in disregard of their fundamental rights to notice of charges in advance and an opportunity to be heard thereon?

(c) the judge made key misfindings of fact and showed carelessness and lack of objectivity throughout his decision?

(d) the judge on the third of eight days of hearing without any basis accused attorney petitioners' bookkeeper of giving false testimony concerning the preparation of certain expense records and accused petitioners of "attempting to perpetrate a fraud upon the court"?

(e) the judge based his finding that the testimony of attorney petitioners was not credible upon his erroneous "findings" of fraud and unethical conduct?

(f) the judge carried out secretly in parallel with the fee and expenses proceedings his own prosecution of charges of fraudulent and unethical conduct, in which he acted as accuser, prosecutor and judge?

3. Did the Court of Appeals err in overlooking such procedural irregularities in the district court as failure to join issues in advance of hearing on hundreds of accounting items, the permission of the district judge to vindictive defendants

to oppose a fee award from a fund belonging to plaintiffs and their corporation, and the conducting of the hearing like a boundless discovery proceeding rather than a trial of issues of fact?

4. Did the Court of Appeals err in awarding attorney petitioners only $15,400 for their efforts, where they spent at least 1,274 hours in legal services, where they achieved a substantial set of rights for a corporation, in its capacity as a security holder in another corporation, an increase in the number of securities and $40,000 in damages, and where the principle defense counsel were paid at least $70,000 for their efforts and where counsel for individual defendants were paid $25,000? In particular, did the Court of Appeals err:

(a) in holding that a monetary benefit was necessary to give rise to a fee award?

(b) in holding that the participation of counsel for the beneficiary corporation in settlement negotiations was a factor subtracting from attorney petitioners' entitlement to be paid, even though corporate counsel did nothing to prosecute the litigation?

5. Did the Court of Appeals err in affirming an arbitrary award of only 60% of attorney petitioners' expenses?

6. Did the Court of Appeals err in not expunging from the record a district judge's opinion that was replete with defamatory statements, made without notice and opportunity to be heard in advance on the truth of such statements, and that contained confidential and irrelevant information about attorney petitioners?

7. Did the Court of Appeals err in communicating with and seeking an advisory investigation by the Disciplinary

Board of the Supreme Court of Pennsylvania as a predicate to its ultimate disposition of the case?

8. Did the Court of Appeals err in excluding evidence of relevant facts supervening since judgment in the district court, where the evidence contradicted the unfounded speculation of the district court about future events?

9. Did the Court of Appeals err in not awarding costs on appeal and in not stating whether interest should be paid from the date of the district court judgment?

Constitutional Clause Involved

Constitution of the United States, Amendment V: ". . .; nor [shall any person] be deprived of life, liberty, or property, without due process of law; . . ."

Statement of the Case

1. Jurisdiction of the district court

Jurisdiction of the district court of the petitions for award of counsel fees and expenses was based on the principle of continuing jurisdiction to hear such petitions arising from legal services in litigation, of which the court had jurisdiction. This principle was stated by this court in *Sprague v. Ticonic Bank,* 307 U.S. 161 (1938).

2. Background

Goldchip Funding Company and Cosmopolitan Investors Funding Company are affiliated corporations. Goldchip owns about one-third of the stock of Cosmopolitan, which in turn owns various defunct subsidiaries. Goldchip and Cosmopolitan were founded in late 1967 by defendants Robert Nelson and Robert Di Stefano, two former dancing instructors, turned insurance salesmen and stock promoters. The corporate purpose was life insurance. Ruth C. Leib, Frank B. Leib, Andrew Yenchko and Mary K. Yenchko ("plaintiff petitioners") were shareholders of these companies, along with about 5,000 other residents of Pennsylvania. The companies' only successful activity was selling stock, to the extent of about $6 million worth. Under the guidance of their founders, the companies lost all but about $1,500,000 between 1967 and June 30, 1972. At that time, the directors of Cosmopolitan decided to terminate operations and sell out. Led by Nelson, the directors decided to amalgamate with 20th Century Corporation, another small, recently formed insurance company, with an only slightly brighter history and prospects. Nelson arranged for a cash buy-out of his interests (for which he had paid in services), but the investors in Cosmopolitan and Goldchip were to receive only unmarketable 20th Century common stock. Due to legal delays involved in a full-scale merger, the parties set out upon a two-step plan of amalgamation. The first step called for an immediate purchase of Cosmopolitan's insurance operation. The directors of Cosmopolitan thought that this step ("Step One") did not require shareholder approval. Step One was completed by the end of 1972. In September, 1973, the directors presented to the shareholders of Cosmopolitan a plan to transfer all remaining assets of Cosmopolitan to 20th Century in return for 20th Century common stock ("Step Two"). These assets were of investment quality and included marketable corporate bonds, common stock and developed and undeveloped tracts of real estate, having aggregate value of about $1 million. Step One involved a payment to Cosmopolitan of 223,118 common shares, and

Step Two involved a payment to Cosmopolitan of 260,890 common shares. Having no market, 20th Century shares were evaluated by 20th Century at $4.21, and this value was accepted by Cosmopolitan without independent appraisal. This was more than double 20th Century's book value, and its operating history suggested that a discount, rather than a premium, was in order. 20th Century sustained losses before capital gains in every year from 1969 through 1972 and, as it subsequently developed, it lost $729,704 in 1973 (equal to about one-seventh of its net worth). 20th Century's principal business is credit accident and health insurance, described by an insurance expert as "highly volatile".

On September 27, 1973, plaintiff petitioners sued to prevent Step Two from taking place, on grounds that proxy solicitations sent to shareholders were misleading and that the plan was a fraud on shareholders and a waste of corporate assets. Step Two was alleged to be unfair to Cosmopolitan and Goldchip shareholders and contrary to their best interests. The cash buy-off of Nelson, but not of the other shareholders, was cited. The district court denied applications for restraining injunctions. Step Two was consummated with the approval of Cosmopolitan directors, and the case proceeded to trial for either recision or damages.

Plaintiff petitioners also sued Nelson, Di Stefano, a former officer and another director of Cosmopolitan, on the grounds of negligence and conversion, for the approximately $4,500,000 lost between 1967 and 1972.

The case was factually complex, due to the maze of irregular transactions in which Cosmopolitan engaged. Nelson estimated that Cosmopolitan had at least 34 defunct subsidiaries, and part ownership in a Caribbean island and several off-shore mutual funds. With the exception of the insurance subsidiary, each of the investments was a total loss to Cosmopolitan. Prosecution of the action was made difficult by the initiation of an SEC investigation as a result of this suit. Defendants sent most of their corporate records to the Commission, delaying plaintiffs' trial preparation. This was significant because of the policy of the district judge, to whom the case had been assigned, that all civil cases should be tried within six months of filing, and preferably sooner.

The case was vigorously litigated, with about 30 motions and applications. At one point, defendants filed interrogatories addressed to all 5,000 class members and served them on counsel with a request that they be answered under oath within 30 days. (Objections to these interrogatories were sustained.) By the beginning of trial, only 11 months after the action commenced, there had been 235 docket entries. The parties had to simultaneously prepare the case for trial, explore settlement possibilities, and, in the case of plaintiffs, investigate several defendants' ability to pay judgments if won.

The case came to trial on August 29, 1974, and was settled, subject to court approval, in the courtroom on September 5, 1974, after several trial days. The Court approved the settlement on November 18, 1974.

3. The Petitions

On November 18, 1974, attorney petitioners filed a petition for award of counsel fees in the amount of $75,000. Citing *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970), attorney petitioners asked that their fee be paid by Cosmopolitan. Richard A. Ash, Esq., stated that he spent 599.8 identifiable hours in prosecuting the action, and Cletus P. Lyman, Esq., stated that he spent 674.4 identifiable hours in prosecuting the action. Each attorney attached a schedule showing the date of each service rendered, the nature of the service, and the hours spent on each date. Lyman stated that the fair hourly billing rate for non-contingent services of lawyers in the area comparable to himself was no less than $50.00 per hour, and Ash stated that the fair hourly billing rate for non-contingent services for comparable attorneys in the area was no less than $60.00 per hour. The fee petition is reproduced as Appendix N, hereto. On December 3, 1974, petitioners filed a petition for award of identifiable expenses of litigation incurred by plaintiffs and their attorneys. Petitioners requested that Cosmopolitan reimburse attorney petitioners in the amount of $10,427.86 and reimburse plaintiffs in the amount of $460.00. The petition alleged that attorneys had spent $2,939.51 for notes of testimony, $2,378.16 for witness fees, $1,231.96 for travel, $847.99 for long distance telephone calls, $781.05 for paralegal services, $734.42 for printing, $602.52 for mailing, $494.48 for copying (out of office), $178.93 for service of process, $178.47 for dinners for staff (overtime), $138.00 for clerks' fees, $150.00 for copying (in office), $105.70 for mailing services, $25.72 for messengers, $25.00 for clerical services, $85.00 for addressed labels, and $33.00 for lunches and dinners with clients. The petition alleged that Cosmopolitan had already reimbursed $218.15 pursuant to an agreement to share certain costs during litigation and that $280.90 was repaid by witnesses who did not appear at trial. The petition alleged that plaintiffs incurred traveling expenses in traveling to hearings, shareholder meetings, and conferences in the amount of $460.00. The expenses petition contained a schedule which showed the date on which each expenditure by attorney petitioners was made, the payee, the nature of the expense and, in most cases, an explanation why the expenses were made. The expenses petition is reproduced as Appendix M, hereto.

4. Course of the Proceedings

On the fourth day of trial of the primary case, September 4, 1974, the parties informed the court that during the trial recesses they had been able to arrive at a concept for settlement and that it was the desire of all parties that a one-day recess be granted to see if a settlement could be achieved. On September 5, 1974, all parties announced a settlement, subject to approval of the court after notice to Cosmopolitan shareholders. On October 18, 1974, notice was sent to shareholders advising them of the proposed settlement, of their opportunity to object at a hearing on November 18, 1974, and of the intention of attorney petitioners to seek a fee of $75,000 and expenses of about $10,000 in the event that the settlement was approved. The settlement was approved without objection on November 18, 1974. The Court reserved jurisdiction to consider the matter of counsel fees and expenses. Shareholders who attended the hearing were told that they had a right to be heard on the question of counsel fees and expenses, if they wished, and that they should notify the clerk if they desired to be notified of the date of hearing.

In connection with the hearing on November 18, 1974, attorney petitioners filed and provided a copy of their fee petition to the court and opposing counsel together with a copy of an expense petition substantially identical to that which was subsequently filed. No answers or objections were ever filed in response to the fee and expense petitions nor was any pre-hearing discovery ever sought from petitioning counsel.

The hearing on the petitions for fees and expenses commenced on December 3, 1974. The hearing was attended not only by petitioners and by counsel for defendant Cosmopolitan, but also by counsel for defendants 20th Century and Robert Nelson. The hearing continued throughout December 3, 4, 5, 6, 7, 16, 17 and until midday on December 18. Despite attorney petitioners' repeated requests that counsel for defendants other than Cosmopolitan be excluded from the proceedings, the district judge permitted them to participate as if their clients had standing. The district judge also ignored attorney petitioners' repeated request that defense counsel state objections, if any, to the petitions in advance of testimony. The hearing was conducted like a discovery proceeding, and defense counsel were permitted wide latitude to cross-examine attorney petitioners on their petitions and numerous irrelevant details of their legal practice and personal lives. The judge acted as if petitioning counsel should have available in court all documents that could conceivably bear upon the inquiry. The judge vigorously participated, asking many questions, both during the examination by defendants and the periods reserved for court questions. The court *sua sponte* ordered production of information from attorney petitioners' tax returns, disclosing their past incomes and overhead. The judge stated that he was acting as a "guardian" for shareholders and he said that his role was "primarily for [shareholders'] protection". He assumed this role even though Cosmopolitan, the party from whom fees and expenses were sought, was represented by counsel, who was familiar with the case and had demonstrated complete adversity to petitioners throughout the litigation and, in particular, with respect to the fee and expenses petitions. Petitioners were thus opposed by an array of: counsel representing the party from whom they sought awards, two attorneys for defendants whose motive was reprisal against attorney petitioners, and the district judge.

During the hearing on the petitions on December 5, 1974, the district judge, without any factual basis, expressed the suspicion that (a) attorney petitioners' bookkeeper had given false testimony concerning the preparation of certain expense records and (b) that petitioning counsel had attempted "to perpetrate a fraud on this court". On the same day, attorney petitioners proved that these charges were baseless and then moved that the district judge recuse himself because of bias and prejudice against them. The judge denied this oral motion as well as a subsequent written motion to the same effect.

On March 28, 1975, the district judge filed an 81-page opinion based on his bench notes of trial rather than the trial transcript. That opinion comprised 298 separate "findings of fact", 17 pages of discussion, and 20 "conclusions of law". The opinion also included a statement that a copy was being furnished by the judge to the Disciplinary Board of the Supreme Court of Pennsylvania.

The opinion found that the value of attorney petitioners' services was $6,000. The judge then reduced attorney petitioners' fee to $3,000 because of charges of "fraud" and "unethical conduct", which he erroneously leveled at attorney petitioners in his "findings" and opinion. The judge's charges are set forth as Appendix J, hereto. The charges were different from the charge made during the hearing, which had been completely disproved. The charges had not been made prior to the opinion by the court or any party. The judge also disallowed 40% of attorney petitioners' claimed expenses. The judge did, however, award plaintiffs reimbursement of the full $460.00 claimed by them. The release of the district judge's opinion was foreseeably followed by wide publicity in the daily press, reporting the "findings" of the district judge and his referral of the matter to the Disciplinary Board. Several such articles are reproduced as Appendix I, hereto. Attorney petitioners appealed to the Court of Appeals on

April 7, 1975. Plaintiff petitioners also filed timely appeals. Attorney petitioners requested that the district judge withhold his decision from publication by West Publishing Company at least until the Court of Appeals had heard and decided their appeal. The trial judge not only refused this request but issued an order [Appendix H, hereto] stating that the opinion should be published and noting that he requested its publication to alert other courts to his views concerning the alleged misconduct of attorney petitioners.

Attorney petitioners appealed that order and moved the Court of Appeals to stay publication of the opinion, pending the Court of Appeals' decision on their first appeal. On July 11, 1975, the Court of Appeals granted the motion to stay publication. Attorney petitioners' second appeal was consolidated with the earlier appeals.

The consolidated appeals were argued before a panel of the United States Court of Appeals on November 21, 1975 (Van Dusen, Rosenn and Adams, J.).

On July 14, 1976, the Court of Appeals filed its judgment, accompanied by a 29-page opinion [Appendix F, hereto]. The judgment increased the fee awarded to attorney petitioners from $3,000 to $15,400 and affirmed the awards of March 28, 1975, in other respects. The Court of Appeals opinion directed that the opinion of the district court of March 28, 1975, be restricted to the district court, counsel and the Disciplinary Board. By separate order, the Court of Appeals impounded its own opinion until further order [Appendix E, hereto]. Also on July 14, 1976, the district judge, apparently in response to an unrecorded communication from the Court of Appeals, issued an order impounding its opinion of March 28, 1975 until further order [Appendix D, hereto]. The Court of Appeals found that the evidence did not support the charges of fraud and unethical conduct made by the district judge; the Court of Appeals also found that the charges were made without notice in advance or an opportunity to be heard thereon. The opinion noted that the Disciplinary Board should be given an opportunity to act before it entered a further order on the issue of what to do with the two opinions.

On August 17, 1976, attorney petitioners filed a petition for rehearing by the Court of Appeals, which was denied on August 26, 1976. On September 16, 1976, attorney petitioners moved that the court modify its opinion of July 14, 1976, to correct an erroneous statement of fact, contradicted by the record, and that it modify its mandate to comply with Rule 37, Federal Rules of Appellate Procedure, requiring that instructions be given with respect to the award of interest on the judgment, as modified. On September 29, 1976, the Court of Appeals denied that motion without opinion.

On November 9, 1976, the Disciplinary Board of the Supreme Court of Pennsylvania notified attorney petitioners that, upon the receipt of Judge Muir's opinion (treated as a complaint against attorney petitioners), the chief counsel of the board reviewed voluminous material submitted by the judge and by attorney petitioners and also submitted the materials to a reviewer designated by the board. As a result of these reviews, a decision was made to close the file opened on Judge Muir's complaint without taking any action against attorney petitioners. Chief counsel advised that the matter was ended with no discipline record for either attorney petitioner and that the district judge and Judge Van Dusen, senior judge of the panel who heard the case in the Court of Appeals, were notified that the Disciplinary Board considered the matter to be at an end.

On November 11, 1976, attorney petitioners moved the Court of Appeals for a further order to permanently impound, prohibit the publication, and mandate the confidentiality of the district court's opinion; to impound the Court of Appeals opinion; to issue a memorandum opinion stating: that the district judge's charges were unsupported by the record, that the district judge should not have published[1] the fact of his referral of his unfounded charges to the Disciplinary Board, that the chief counsel of the Disciplinary Board and a second reviewer found those charges not supported by the evidence, that counsel closed his file without any disciplinary record against attorney petitioners, and that the Court of Appeals increased their fee from $3,000 to $15,400. The Court of Appeals has not yet acted on this motion.

5. Statement of Facts Material to Consideration of the Questions Presented

All pretrial proceedings in the primary case and the trial itself were conducted by attorney petitioners, on a wholly contingent basis, without assistance from other counsel or from any governmental agency. Attorney petitioners took all discovery, including 14 depositions, spent 111.5 hours reviewing documents, made motions for injunctions, participated in 36 written motions, filed a 236-page pretrial memorandum, and presented a case at trial for five days. Prior to trial, there had been six days of hearings in open court in Williamsport and Lewisburg, Pennsylvania, on injunctions and class action status and, an additional day on which the pretrial conference was held. Counsel for Cosmopolitan took no discovery, filed no pleading, filed no pretrial memorandum, listed no witness to be called or exhibit to be introduced, filed no trial brief, and failed to make timely production of its own records as requested by attorney petitioners.

The settlement of the case, as achieved among the parties on September 5, 1974, and as confirmed by the court pursuant to Rules 23 and 23.1, Federal Rules of Civil Procedure, on November 18, 1974, provided that defendant Nelson would pay Cosmopolitan $25,000 and that defendant 20th Century Corporation would (1) pay Cosmopolitan $15,000, (2) deliver to Cosmopolitan 40,509 additional securities, called "special preference units" and (3) deliver to Cosmopolitan 260,980 "special preference units" in exchange for return of the same number of shares of common stock previously delivered as payment for Cosmopolitan's investment assets. "Special preference units" are securities especially created for the settlement, and have the following characteristics: (1) at the option of the holder, they are convertible at any time into common stock at 20th Century, and (2) they may be redeemed in cash at $4.21 each if any of certain specified developments occur.

The parties stipulated that "all of the consideration being paid to Cosmopolitan" is a benefit "resulting from a litigation instituted by plaintiffs".

20th Century paid its counsel at least $46,000 *exclusive* of the last month's trial preparation, the trial itself, and settlement proceedings. Counsel for 20th Century spent at least 1,095.55 hours from the beginning of the case through settlement, and a reasonable estimate of the amount paid them through settlement is $70,000. Counsel for defendant Nelson and other individuals accepted $25,000 for 700 hours' work, giving consideration to their clients' financial straits. Defense counsel worked on a non-contingent basis. Counsel for 20th Century carried the laboring oar for defendants as a whole.

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[1] The Court of Appeals noted Rule 17-23, Rules of the Pennsylvania Supreme Court, which requires that all proceedings before the Disciplinary Board be confidential.

Attorney petitioner Lyman was graduated from Yale University in 1967; studied business and applied economics at the graduate school of the University of Pennsylvania, and was graduated from the University of Pennsylvania law school in May of 1971. He is a member of the bar of this court (1975), the bar of the Supreme Court of Pennsylvania (1971), the Courts of Appeals for the Second (1973) and Third (1972) Circuits and the Eastern (1972) and Middle (1973) Districts of Pennsylvania. He has worked on cases with attorney petitioner Ash since 1971, specializing in shareholder and class action suits; and has been an equal partner in the firm of Lyman & Ash since its formation in November 1972, specializing in these types of cases.

Attorney petitioner Ash received a Bachelor of Science degree as well as a Bachelor of Arts degree from Lehigh University in 1951 after completing a five-year course; in 1954, he received a Masters' degree in mathematics from the University of Michigan, where he also held a teaching fellowship; and in 1964 he was graduated from the University of Pennsylvania law school. He has been a member of the bar since 1965 and has specialized, with Mr. Lyman, in class action and shareholder suits since 1971. He was a party in a shareholder case in this court, *Cort v. Ash,* 422 U.S. 66 (1975). As of the time their petitions were before the district court, attorney petitioners had been involved in some 19 class or shareholders actions, and they had been successful in achieving relief for their clients in most of those cases that had been completed, as of the time their petitions were before the court. Other district courts had awarded them substantial fees in similar cases: $7,500 for 70 hours; $7,400 for 72 hours; $22,000 for 208 hours; and $78,000 for 600 hours. Attorney petitioners' services throughout the litigation were of excellent quality, which led the district judge to state, in a published decision on the class action certification, dated January 15, 1974, that they were "competent and experienced in this type of litigation." *In re Goldchip Funding Company,* 61 F.R.D. 592, 594 (M.D.Pa. 1974). The district judge wrote this opinion after having opportunity to observe attorney petitioners at a TRO hearing, a preliminary injunction hearing, and a class action hearing and to scrutinize the substantial number of pleadings and briefs filed in connection with those proceedings. The judge characterized such pretrial hearings as "miniature trials."

The district judge assumed the role of representative of the interests of Cosmopolitan shareholders in the fee and expense proceeding. He described himself as "guardian" of the shareholders and stated that he was conducting the proceedings "primarily for their benefit." Prior to the beginning of the hearing on fees and expenses, the district judge stated that the amounts in question were "substantially higher than I originally anticipated."

The eight-day hearing consisted almost entirely of cross-examination of Lyman & Ash by the several defense counsel and the district judge. The first three days were devoted to expenses and the balance to the fee.

The reasonableness of the 1,274 identifiable hours was incontrovertible. Many hours identified were spent in the courtroom, many were spent at depositions and conferences attended by other counsel, and most were spent in the preparation of documents filed in the case. As the judge noted at the hearing, the court file was too large for his female clerk to bring into the courtroom. The hours claimed were modest compared to the approximately 1,800 hours spent by counsel for 20th Century and counsel for defendant Nelson and other individuals. The hours spent were confirmed by time records maintained by attorney petitioners during the latter five months of the fourteen month case. 842 of the 1,274 hours were so recorded. The hours spent were also confirmed by the time records of counsel for 20th Century.

The fact of the expenses was incontrovertible since they had been paid by check. The propriety of about 95% of the expenses was incontrovertible since the payments were to court reporters, witnesses, printers, copy services, marshals, and the clerk of court. Only about 5% of the expenses reasonably required elaboration.

At some time during the course of the hearing, the district judge began to secretly propound his charges of fraud and unethical conduct against attorney petitioners. The only accusation made during the hearing was about the testimony of attorney petitioners bookkeeper, which was completely disproven the day it was made.

The judge carried out his own investigation into disputed facts. He privately sought evidence from the local telephone company in an unsuccessful attempt to discredit attorney petitioners' testimony as to the rates of taxes and surcharges on telephone bills. He utilized his erroneous and selective interpretation of information he derived from a book by Statsky entitled *Introduction to Paralegalism* to discredit attorney petitioners' testimony [A137-8]. This volume was never mentioned during the proceedings and surfaced for the first time in the judge's opinion as a basis for his finding that they acted improperly and were not worthy of belief [A128].

On March 28, 1975, the judge issued his 81-page opinion, which was filed publicly in Williamsport on the same day that it was mailed to attorney petitioners in Philadelphia [Appendix K]. The opinion contained accusations of fraud and unethical conduct in the form of "findings". These "findings" were the first time attorney petitioners received notice of the accusations against them. The charges are listed as Appendix J, hereto. Among the charges were that certain entries on time records were "fraudulent", that expenses listed under "dinners for staff (overtime)" were intentionally camouflaged personal living expenses and that the services of an employee were deliberately mischaracterized as "paralegal". Another charge was that attorney petitioners had an arrangement with their clients that the attorneys, not the clients, would be liable for expenses of litigation, in violation of the Code of Professional Responsibility, Disciplinary Rule 5-103(B).

The opinion contained 112 erroneous findings of fact. The erroneous findings included that counsel for Cosmopolitan was responsible for settlement both with 20th Century and Nelson. This was contradicted not only by testimony of attorney petitioners but also by testimony of Nelson's counsel and the record of the case. The error was compounded by another misfinding wherein the district judge found that the lawyers, who actually represented Nelson, were counsel for Cosmopolitan [A119]. Another key error was that the settlement with 20th Century involved only 40,509 "special preference units" rather than 301,489 units.

The opinion reproduced income and overhead figures from counsels' tax returns [A70-1], obtained by a *sua sponte* order of the court, over attorney petitioners' objection. The district judge also found that attorney petitioners were not rated in Martindale-Hubbell and that attorney petitioners never tried a case to a jury. This finding was made even though this case did not involve a jury trial. The cardinal sentence in the opinion is:

> "Considering all the facts and circumstances in evidence, including but not limited to the false entries in Lyman's time records, improper characterization of the college student bookkeeper and filing clerk as a paralegal and deceitful camouflaging of personal living expenses under 'dinners for staff (overtime)', I am obliged to conclude that the testimony of Lyman & Ash is not worthy of belief and I reject it." Appendix K, hereto at A 128.

Proceeding from this rejection of testimony, the district judge stated that he could not make "any finding of the amount of time actually expended" by attorney petitioners in the case [A128-9]. He nevertheless found, on the basis that they never tried a jury case, that the fair rate of compensation for their time was $20 per hour for office work and $30 per hour for court work [A127]. He then determined that a proper fee would be $6,000 but for the alleged fraud and unethical conduct, but that the fee should be reduced in half to $3,000 on account of these factors [A134].

On the question of value of the "special preference units", the district judge decided that their protective value was of little significance because of what he found to be the adequate financial preformance of 20th Century. He ignored the unbroken string of annual losses of 20th Century, including a loss of $729,704 in 1973, the last year for which results were available. He went so far as to speculate, without any evidence on the point, that the net worth of 20th Century had probably increased during the last six months of 1974.

The opinion stated that the clerk of court was directed to forward a copy of the opinion to the disciplinary board of the Supreme Court of Pennsylvania for whatever action that body deemed appropriate [A144].

Immediately after the release of the opinion, news articles appeared in the daily press summarizing the "findings" made by the district judge and giving emphasis to his referral of the matter to the disciplinary board. One such article pointed out that the disciplinary board had the power to suspend or disbar attorneys. Several such articles are Appendix I hereto.

On June 12, 1975, attorney petitioners wrote to the district judge and asked that the opinion not be published at least until the court of appeals decided the case [A49-56]. The request pointed out that the charges were false and that, in any event, they were made as "findings" without notice in advance to attorney petitioners or opportunity to be heard on the truth thereof. The district judge entered an order on June 18, 1975, denying the request, ordering that the opinion be published, and making it clear that his purpose in publishing was to destroy attorney petitioners' standing with other courts. Appendix H [A47-8].

Attorney petitioners appealed that order to the court of appeals and moved for a stay of publication of the district court's opinion. The court of appeals granted a stay of publication on July 11, 1975 [Appendix G.].

On July 14, 1976, the court of appeals issued its 29-page opinion and judgment in the consolidated appeals. The court of appeals set aside the findings of fraudulent and unethical conduct [A34-5] and held that the opinion should not have been publicly filed with such charges in it [A38]. It also held that public referral of the opinion to the disciplinary board was improper and inconsistent with the Rules of the Pennsylvania Supreme Court, mandating confidentiality of complaints to that board [A38]. The court of appeals not only found that the evidence did not justify the "findings" but that they were made in violation of the basic requirements of due process of law [A34-5, A38-9]. The court of appeals held that it was improper for the district judge to *sua sponte* require production of attorney petitioners tax returns [A23]. The court of appeals found that the district judge's finding that Appellants' did not produce the $25,000 settlement with individual defendants was clearly erroneous [A31]. The court of appeals fixed the fee due to attorney petitioners at $15,400 [A34], or over five times the fee awarded by the district judge. The court of appeals concluded that $40 an hour was a reasonable rate for attorney petitioners' time [A29].

Nevertheless, the court of appeals determined that, under Rule 52(a), Federal Rules of Civil Procedure, it was bound to accept as true any finding of fact by the district judge unless it "(1) is completely devoid of minimum evidentiary support displaying some hue of credibility or (2) bears no rational relationship to the supporting evidentiary data" [A19]. The court of appeals therefore refused to set aside the finding that attorney petitioners' testimony was to be rejected and that the quality of their work was "substandard".

The court of appeals selected the lesser of the number of hours spent by the defense law firms, namely the 700 hours spent by Nelson's counsel, as the basis for computing a fee [A28]. The court of appeals multiplied 700 hours by $40 per hour and arrived at a starting point of $28,000. The court of appeals then multiplied by 10% to take into account the "contingency factor", and arrived at $30,800. The court of appeals then reduced that figure by 50% because of the alleged substandard quality of the work and inability to translate the special preference units into monetary terms. The resulting fee awarded was $15,400.

The court of appeals declined to review the arbitrary 40% reduction in claimed expenses, but made the observation that the district court was entitled to reduce the total of awardable expenses to take account of (1) unreimbursable items and (2) poor records [A35]. The court of appeals then cited the copying of legal research and dinners as two categories which might *include* unreimbursable items and in office copying, travel and telephone charges as categories of expenses affected by poor record keeping [A36]. The total amount claimed under these categories was about $1,300 or 13% of expenses claimed.

The court of appeals ignored that among the reasons for the 40% reduction in awarded expenses were the district judge's charges of fraudulent and unethical conduct, which the court of appeals rejected elsewhere in its opinion.

The court of appeals saw nothing wrong with the district judge acting also as "representative" of the class of Cosmopolitan shareholders, and expressly endorsed a "more active role" for a judge in the context of a fee hearing [A23]. The court of appeals reasoned that the potential for abuse by attorneys is great as they often have unbridled discretion in such proceedings. The court of appeals ignored that, in the case, the fee award was not sought from a fund or a class but from a corporation managed by directors and represented by counsel, opposed to the award.

The court of appeals refused to consider evidence submitted to it for the first time of the financial performance of 29th Century for the year 1974. This evidence was not presented to the district court because it did not become available until one month after the district court's opinion. It contradicted the speculative finding of the district court that 20th Century increased its net worth during the latter part of 1974. The evidence, an annual report of 20th Century, disclosed that its net worth was reduced by $876,521 during the period cited by the district judge.

The Court of Appeals ordered that the March 28, 1975, opinion of the district court be restricted to counsel, the district court and the disciplinary board [A12], that the confidentiality of the district court opinion and the court of appeals opinion be preserved by counsel, and that the opinion of the court of appeals be impounded until further order of court [A39]. The court of appeals concluded that further action with respect to the two opinions should await action of the disciplinary board if it acted within a reasonable period of time [A38-9].

After rehearing was denied on August 26, 1976, attorney petitioners moved that the court of appeals correct a factual error in its opinion, which reflected unfavorably on attorney petitioners. The court of appeals erroneously said that attorney petitioners spent 20 hours and produced 7 pages of motion papers [A22], whereas the record clearly showed that they produced 37 pages of motion papers. Attorney petitioners also asked that the Court of Appeals comply with Rule 37, Federal Rules of Appellate Procedure, and state whether interest should be paid on the judgment of the district court, as modified, from the date of the district court's judgment. On September 29, 1976, the court of appeals denied this motion [Appendix A].

On November 9, 1976, counsel for the disciplinary board notified petitioners that:

> ". . ., Judge Muir's complaint, your statement and the voluminous material which both the judge and your counsel submitted to this office were forwarded to Chief Disciplinary Counsel for his review and recommendation. Following Chief Counsel's review the entire file was submitted to a reviewer designated by The Disciplinary Board. As a result of these reviews the decision was made to close the files opened on Judge Muir's complaint without taking any action against you. Thus the matter is ended with no discipline record for either of you. . . . Judge Van Dusen and Judge Muir have been advised by Chief Counsel of this decision and this office considers the matter to be at an end."

On November 11, 1976, attorney petitioners moved the court of appeals to permanently impound the district court opinion and mandate its confidentiality, to permanently impound its own opinion, and to issue a memorandum stating that the charges made by the district judge were unsupported by the evidence, had been found unsupported both by the court of appeals and the Disciplinary Board, were made without due process of law and should not have been published; and further stating that the referral to the Disciplinary Board should not have been made public and that the court of appeals modified the fee award from $3,000 to $15,400. This motion has not yet been acted upon.

REASONS WHY THE PETITION SHOULD BE GRANTED

1. This case involves federal questions of extraordinary importance, and the court of appeals has sanctioned a departure by the district judge from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's power of supervision.

The approval by the court of appeals of the assumption by the district judge of the role of "representative" of the Cosmopolitan shareholders is in conflict with the principle that judges must be impartial. This court has always upheld this principle. *In re Murchison*, 349 U.S. 133, 136 (1955). An exception to the rule, for attorneys who are compensated by court awards, is particularly inappropriate. Congress is expanding the circumstances in which court-awarded fees are available in order to further important policies. It is unlikely that attorneys will respond to Congressional incentives and carry out litigation, to be financed by court awards, if their fee petitions are to be reviewed by a party-judge, acting as an investigator, both on and off the bench. The accepted and usual procedure where a court finds a party unrepresented is to appoint a guardian. *Cf.* Rule 17(c), Federal Rules of Procedure.

Although this Court has often addressed itself to the availability of fee awards [*Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240 (1975); *Mills v. Electric Auto-Lite Co.,* 396 U.S. 395 (1970); *Trustees v. Greenough,* 105 U.S. 527 (1881)], it has not addressed itself in modern times to either the standards or procedures for determining the amount of such awards. In light of the comparatively recent development of class action litigation since the 1966 amendment to Rule 23, Federal Rules of Civil Procedure, and the recent congressional enactments and pending legislation authorizing fee awards, guidance from this Court is now due. These questions are likely to be a frequent concern to the lower courts.

This Court has identified the delicacy of the problem of Court awarded fees. As stated in *F.D. Rich Co. v. Industrial Lumber Co.,* 417 U.S. 116, 129 (1974) (Marshall, J.):

> ". . . , there is the possibility of a threat being posed to independent advocacy by having the earnings of the attorney flow from the pen of a judge before whom he argues."

The district judge not only controlled the flow of earnings of attorney petitioners, but also wielded power to greatly injure

their reputations and future earning power. If the court of appeals' deference to the district judge is not reversed by this Court, attorneys seeking fee awards will have to strive as much to curry favor and, more importantly, to avoid disfavor of the district judge as to advocate their clients' interest. Having a divided constituency will put attorneys, who anticipate fee awards, at a disadvantage compared to attorneys who are paid by their clients.

The award of the court of appeals is so low as to discourage attorneys from undertaking litigation financed by court awards. The ten percent "contingency factor" does not compensate for deferral of payment awarded more than three years after the case began and 20 months after the last services were rendered. It is unrealistic to expect an attorney to undertake litigation on a 10% contingent fee basis, no matter how well founded the case may seem. Any experienced practitioner knows that evidence often fails to develop as expected, the law may change, clients may withdraw, defendants may become judgment-proof, and courts may decide the case wrongly. Clients, witnesses, or the lawyers themselves may become disabled or die during the pendancy of the case, with destructive effects on the case.

The 50% reduction from the value of attorney petitioners' time because the benefit was partly non-monetary means that they worked for little more than overhead, even though they won a valuable settlement, approved by the court as adequate. This does not take into account the time and expenses necessary to petition for the fee and expenses, which in this case involved an eight-day hearing, an appeal and now this petition.

Granting discretionary authority to district judges to discount a schedule of litigation expenses by 40 percent, without ruling on the items individually, confers second class standing on attorneys. All other litigants are entitled to itemized determinations of their special damages, and it is unlikely that attorneys will wish to bring litigation if reimbursement of their out-of-pocket expenses is subject to arbitrary percentage discounts, depending on the judge's reaction to their record maintenance practices or his belief that some items may be unreimbursable.

A mechanical application of Rule 52(a), under the circumstances of this case, by the court of appeals, tips the balance of power too far toward district courts, at the risk of tyrannical behavior by judges and the terrorizing of litigants and their attorneys. This Court has recognized the possibility of a "complaint, biased or eccentric" judge in the context of discussing the right to a jury trial. *Ludwig v. Massachusetts*, No. 75-377, decided June 30th, 1976, 44 U.S.L.W. 5173; *Williams v. Florida*, 399 U.S. 78, 100 (1970). In an equity case such as this, where a jury trial is unavailable, it is essential that the right of appeal be meaningful. The court of appeals has conferred inviolability on findings of credibility and quality since any record will yield at least a scrap of support for a finding either way.

This case raises the question of abuse of judicial immunity in opinion writing. This Court should take the opportunity to outline the responsibilities that accompany the immunity. The case also raises the limits of judicial activism in conduct of a bench trial, a question not previously decided by this Court. Compare, *Quercia v. United States*, 289 U.S. 466 (1933), establishing limits on judicial activism for jury trials. Both the district judge and the court of appeals erroneously assumed that greater activism was appropriate for a bench trial, disregarding the even greater need for objectivity when

a judge has responsibility for deciding the facts as well as the law.

2. The court of appeals has departed from the accepted and usual course of judicial proceedings so as to call for an exercise of this court's power of supervision.

The communication between the court of appeals and the Disciplinary Board of the Supreme Court of Pennsylvania as a predicate to deciding petitioners' request that the court of appeals expunge the district court opinion and prevent its publication is contrary to the rule that appellate courts decide cases on the record made by the parties in the lower court. The court of appeals had ample basis to conclude, and did conclude, that the charges made by the district judge were unsupported by the record, made without due process of law, and harmed attorney petitioners' livelihood. The court of appeals should have expunged the opinion and prevented its publication without waiting for an advisory investigation by another body.

The court of appeals disregarded the clear language of Rule 37, Rules of Appellate Procedure, which required it to decide whether interest should be allowed on the judgment, as modified. It did so after attorney petitioners expressly requested that it carry out this part of its appellate function.

3. The court of appeals decided questions of federal law in conflict with applicable decisions of this Court.

The deference accorded the district judge under Rule 52(a), Federal Rules of Civil Procedure, and other principles of deference, in the circumstances of this case, was in conflict with decisions of this Court. It is impermissible to combine the roles of accuser, prosecutor and judge. *In re Murchison, supra.* A man may not act as judge of a case in which he has assumed an interest. *Ibid.* Credence should not be given to facts found where the finder is looking for the wrong thing. *Rogers v. Richmond,* 365 U.S. 534, 547 (1960). A judgment which goes beyond the scope of the pleadings is void. *Reynolds v. Stockton,* 140 U.S. 254 (1891). A judge may not be a combatant in a proceeding [*Mayberry v. Pennsylvania,* 400 U.S. 455, 465 (1971)] or become personally embroiled. *Offutt v. United States,* 348 U.S. 11, 17 (1954).

The action of the court of appeals in impounding rather than expunging the district judge's opinion is in conflict with *Goss v. Lopez,* 419 U.S. 565 (1975); *Supreme Council of Royal Arcanum v. Green,* 237 U.S. 531, 546 (1915); and *Green v. Elbert,* 137 U.S. 615 (1891).

The court of appeals' holding that a benefit must be able to be reduced to a monetary equivalence in order to justify a fee award is in conflict with this Court's decision in *Mills v. Electric Auto-Lite,* 396 U.S. 375, 395 (1970). See also *Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240, 259 (1975).

The court of appeals' exclusion of evidence facts supervening after judgment, which contradicted the unfounded speculation of the district judge, was inconsistent with this Court's holdings in *Watts, Watts & Co. v. Union Austriaca Navigatione,* 248 U.S. 9, 21 (1929) and *New York Indians v. United States,* 170 U.S. 1, 32 (1887).

4. The court of appeals decided a question of federal law in conflict with other courts of appeals.

Other courts of appeals have held that preservation of a fund, whether or not accompanied by a measurable monetary gain, is a benefit justifying a fee award. *Ramey v. Cincinnati Enquirer, Inc.,* 508 F.2d 1188, 1194-5 (6th Circuit 1974); *Freeman v. Ryan,* 408 F. 2d 1204, 1206 at N.4 (D.C. Circuit, 1968).

The sanctioning of the role of inquisitor on the part of the district judge is in conflict with the decision of the First Circuit in *Figueroa Ruiz v. Delgado,* 359 F.2d 718, 720 (1st Circuit, 1966).

The tolerance of partiality and acceptance of the district judge's findings under these circumstances conflicts with the decisions of the courts of appeals in *Rosen v. Sugarman,* 357 F.2d 794, 799 (2nd Circuit, on petition for mandamus, 1966), continued *sub nom in re Nazareth Fairgrounds and Farmers' Market, Inc.,* 374 F.2d 595 (2nd Circuit, on appeal, 1967); *Knapp v. Kinsey,* 232 F.2d 458, 465 (6th Circuit, 1956) ("partiality renders resulting judgment "invalid"); and *N.L.R.B. v. Phelps,* 136 F.2d 562, 567 (5th Circuit, 1945) (partiality "taints and vitiates all of the proceedings"). The tolerance of the court of appeals of the hostility of the district judge toward attorney petitioners conflicts with the holding of *Whitaker v. McLean,* 118 F.2d 596 (D.C. Circuit, 1941) ("hostility" evidenced by remark on record renders judgment void.)

Conclusions

For the reasons set forth above, this Petition for Certiorari should be granted to review the judgment of the court of appeals.

Respectfully submitted,

CLETUS P. LYMAN,
1612 Latimer Street,
Philadelphia, Pa. 19103,
Petitioner Pro Se and
Attorney for Other Petitioners.

APPENDIX A

Order of the United States Circuit Court of Appeals for the Third Circuit, Dated September 29, 1976

UNITED STATES COURT OF APPEALS
For the Third Circuit

Nos. 75-1596, 75-1597, 75-1598
& 75-1674

In the matter of

GOLDCHIP FUNDING COMPANY and COSMOPOLITAN INVESTORS FUNDING COMPANY,

RUTH C. LEIB, et al.

v.

20TH CENTURY CORPORATION, et al.,
Defendants,

and

GOLDCHIP FUNDING COMPANY, COSMOPOLITAN INVESTORS FUNDING COMPANY,
Nominal Defendants,

Cletus P. Lyman, Esq. and Richard A. Ash, Esq., counsel for plaintiffs,
Appellants in No. 75-1596,
Ruth C. Leib,
Appellant in No. 75-1597,
Frank B. Leib, Andrew Yenchko and Mary K. Yenchko,
Appellants in No. 75-1598,
Cletus P. Lyman, Esq. and Richard A. Ash, Esq.,
Appellants in No. 75-1674.

(D. C. Civil No. 73-551)

Appendix A—Order of the United States Circuit Court of Appeals for the Third Circuit, Dated September 29, 1976.

Present: VAN DUSEN, ADAMS and ROSENN,
Circuit Judges.

ORDER

After consideration of the APPLICATION FOR MODIFICATION OF OPINION AND MANDATE, the RESPONSE to such application, the MOTION FOR IMPOUNDMENT, and the record, it is

ORDERED that the APPLICATION FOR MODIFICATION OF OPINION AND MANDATE[1] and the appellants' MOTION FOR IMPOUNDMENT OF APPLICATION FOR MODIFICATION OF OPINION AND MANDATE are denied.

BY THE COURT:-

FRANCES L. VAN DUSEN,
Circuit Judge.

Dated: September 29, 1976

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[1] In addition to the reasons given in the Response and the record references at page A21 of this court's opinion, it is noted that (A) the affidavit of July 29, 1974, with exhibits, reproduced at A244-A267 was not solely in support of a continuance motion but also specifically stated to be "to advise the Court of recent out-of-court proceedings so that the Court will know the status of the case as of the date of the final Pre-Trial Conference, today, July 29, 1974, . . . [and] to excuse the failure of plaintiffs to provide all of the papers required by the terms of the Court's Practice Order of October 4, 1973, particularly Para. 5.5 thereof" (A244); and (B) the subject of this application was raised in the Petition for Rehearing at page 5, note 2, and has been denied by the in banc court's order of August 26, 1976.

APPENDIX B

Sur Petition for Rehearing

UNITED STATES COURT OF APPEALS
For the Third Circuit

Nos. 75-1596/7/8 & 75-1674

In the matter of
GOLDCHIP FUNDING COMPANY and COSMOPOLITAN INVESTORS FUNDING COMPANY,

RUTH C. LEIB, et al.,

v.

20TH CENTURY CORPORATION, et al.,

Cletus P. Lyman, Esq. and Richard A. Ash, Esq., counsel for plaintiffs,
Appellants in No. 75-1596,
Ruth C. Leib,
Appellant in No. 75-1597,
Frank B. Leib, Andrew Yenchko and Mary K. Yenchko,
Appellants in Nos. 75-1598,
Cletus P. Lyman, Esq. and Richard A. Ash, Esq.,
Appellants in No. 75-1674.

Present: SEITZ, *Chief Judge,* and VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS and GARTH, *Circuit Judges.*

The petition for rehearing filed by Cletus P. Lyman, Esq. and Richard A. Ash, Esq., Appellants in Nos. 75-1596 and 75-

1674, in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

FRANCES L. VAN DUSEN,
Judge.

Dated: August 26, 1976

APPENDIX C

Order of the United States Court of Appeals for the Third Circuit, Dated July 29, 1976

UNITED STATES COURT OF APPEALS
For the Third Circuit

July 26, 1976

Nos. 75-1596/7/8 & 75-1674

In the matter of
GOLDCHIP FUNDING COMPANY, et al.,

RUTH C. LEIB, et al.

vs.

20TH CENTURY CORPORATION, et al.,

Cletus P. Lyman, Esq., and Richard
A. Ash, Esq., etc.,
Appellants in No. 75-1596 & 76-1674,

Ruth C. Leib,
Appellant in No. 75-1597,

Frank B. Leib, Andrew Yenchko and
Mary K. Yenchko,
Appellants in No. 75-1598.

Present: VAN DUSEN, ADAMS and ROSENN,
Circuit Judges.

Appendix C—Order of the United States Court of Appeals for the Third Circuit, Dated July 29, 1976.

1. Motion by appellants, Cletus P. Lyman, Esq. and Richard A. Ash, Esq., for enlargement of time within which to file a petition for rehearing from its present due date of July 28, 1976, to and including August 17, 1976.

2. Motion by appellants, Cletus P. Lyman, Esq. and Richard A. Ash, Esq., for impoundment of forthcoming petition for rehearing,

in the above-entitled cases. The opinion was filed and the judgment entered on July 14, 1976.

Respectfully,

T. F. QUINN/ags,
Clerk.

enc.
ags

The foregoing Motions are granted.

By the Court,

ARLENE M. ADAMS,
Judge.

Dated: July 29, 1976

APPENDIX D

Order of the United States District Court Dated July 14, 1976

UNITED STATES DISTRICT COURT
For the Middle District of Pennsylvania

In the matter of
GOLDCHIP FUNDING COMPANY AND
COSMOPOLITAN FUNDING COMPANY,

RUTH C. LEIB, et al.,
Plaintiffs,

vs.

20TH CENTURY CORPORATION, et al.,
Defendants.

Civil No. 73-551
Complaint Filed 9/27/73
(Judge Muir)

July 14, 1976

The Clerk shall impound the Opinion of this Court dated March 28, 1975, from this day forth until further order of this Court.

MUIR,
Muir, U.S. District Judge.

APPENDIX E

Order of Impoundment

UNITED STATES COURT OF APPEALS
For the Third Circuit

Nos. 75-1596, 75-1597, 75-1598
& 75-1674

In the Matter of
GOLDCHIP FUNDING COMPANY and
COSMOPOLITAN INVESTORS FUNDING COMPANY,

RUTH C. LEIB and FRANK B. LEIB, on their own behalf and on behalf of the classes of independent shareholders of GOLDCHIP FUNDING COMPANY and COSMOPOLITAN INVESTORS FUNDING COMPANY and derivatively on behalf of GOLDCHIP FUNDING COMPANY and COSMOPOLITAN INVESTORS FUNDING COMPANY, and its subsidiaries,

v.

20TH CENTURY CORPORATION, JAMES C. ROBERTSON, ROBERT NELSON, ROBERT DI STEFANO, ALLEN C. SPANGLER, A. C. MURPHY, SHERNO RESEARCH CENTER, INC.,
Defendants,

and

GOLDCHIP FUNDING COMPANY, COSMOPOLITAN
INVESTORS FUNDING COMPANY,
Nominal Defendants.

Cletus P. Lyman, Esq. and Richard A.
Ash, Esq., counsel for plaintiffs,
Appellants in No. 75-1596,
Ruth C. Leib,
Appellant in No. 75-1597,

Frank B. Leib, Andrew Yenchko and
Mary K. Yenchko,
Appellants in No. 75-1598,
Cletus P. Lyman, Esq. and Richard
A. Ash, Esq.,
Appellants in No. 75-1674.
(D. C. Civil No. 73-551)

Present: Van Dusen, Adams and Rosenn,
Circuit Judges.

As explained in the opinion being filed today in the above appeals, it is

ORDERED that the opinion and judgment being filed today in the above-captioned appeals shall only be made available to the district court, counsel of record, and the Pennsylvania Disciplinary Board until further order of this court.

It is FURTHER ORDERED that such distributees and the parties shall preserve the confidentiality of the opinion and judgment being entered today until further order of this court.

BY THE COURT:-

VAN DUSEN,
Circuit Judge.

Dated: July 14, 1976

APPENDIX F

Opinion of the Court

UNITED STATES COURT OF APPEALS
For The Third Circuit

Nos. 75-1596, 75-1597, 75-1598 & 75-1674

In the matter of GOLDCHIP FUNDING COMPANY and COSMOPOLITAN INVESTORS FUNDING COMPANY,

RUTH C. LEIB and FRANK B. LEIB, on their own behalf and on behalf of the classes of independent shareholders of GOLDCHIP FUNDING COMPANY and COSMOPOLITAN INVESTORS FUNDING COMPANY and derivatively on behalf of GOLDCHIP FUNDING COMPANY, and its subsidiaries,

v.

20TH CENTURY CORPORATION, JAMES C. ROBERTSON, ROBERT NELSON, ROBERT DI STEFANO, ALLEN C. SPANGLER, A. C. MURPHY, SHERNO RESEARCH CENTER, INC.,
Defendants,

and

GOLDCHIP FUNDING COMPANY, COSMOPOLITAN INVESTORS FUNDING COMPANY,
Nominal Defendants.

Cletus P. Lyman, Esq. and Richard A.
Ash, Esq., counsel for plaintiffs,
Appellants in No. 75-1596

Ruth C. Leib,
Appellant in No. 75-1597

Frank B. Leib, Andrew Yenchko and
Mary K. Yenchko,
Appellants in No. 75-1598

Cletus P. Lyman, Esq. and
Richard A. Ash, Esq.,
Appellants in No. 75-1674

(D. C. Civil No. 73-551)

Appeals From The United States District Court
For The Middle District of Pennsylvania

Argued November 20, 1975, and Supplemental
Documents Submitted by Counsel in January & April 1976

Before VAN DUSEN, ADAMS and ROSENN,
Circuit Judges

Cletus P. Lyman, Esq., Lyman & Ash, Philadelphia, Pa., Attorneys for Appellants in Nos. 75-1596/7/8 & 75-1674

James M. Marsh, Esq. & Edward C. German, Esq., Philadelphia, Pa., Attorneys for Appellants in Nos. 75-1596 and 75-1674

Howard D. Scher, Esq. & Ragan A. Henry, Esq., Goodis, Greenfield, Henry, Shaiman & Levin, Philadelphia, Pa., Attorneys for Appellee Cosmopolitan Investors Funding Company

H. Lee Roussel, Esq., W. Jeffry Jamouneau, Esq. & Rod J. Pera, Esq., NcNees, Wallace & Nurick, Harrisburg, Pa., Attorneys for Appellees 20th Century Corporation and James C. Robertson

Barry F. Greenberg, Esq., Cohen, Shapiro, Polisher, Shiekman & Cohen, Philadelphia, Pa., Attorneys for Appellee Robert Nelson

(Filed Jul 14, 1976)

VAN DUSEN, *Circuit Judge.*

This appeal seeks reversal of a district court order entered March 28, 1975, awarding two attorneys $3,000. in counsel fees and $6,256.72 in expenses for their efforts in a class and derivative securities litigation that ended in settlement of all claims. Appellants, Cletus P. Lyman, Esq. and Richard A. Ash, Esq.,[1] who originally sought in excess of $85,000. in fees and expenses, challenge the principal findings of fact on which the award is based and for various reasons seek expungement of all or part of the district court's 81-page opinion and order.[2] For the reasons set forth below, we affirm the order of the district court with certain modifications.

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[1] The named plaintiffs in the consolidated class actions are appellants in Nos. 75-1597 and 75-1598. Messrs. Lyman and Ash are appellants in Nos. 75-1596 and 75-1674. Messrs. Lyman and Ash are referred to hereinafter as appellants.

[2] By a previous order, we had stayed publication of the opinion pending determination of this appeal. We vacate the stay in view of our comments in this opinion, but direct that the opinion be restricted to the district court, counsel, and the Disciplinary Board, as explained below at page A38.

I. *The Facts*

On September 27, 1973, Frank B. Leib, a shareholder in Cosmopolitan Investors Funding Company (Cosmopolitan) commenced a "class and derivative" action seeking to enjoin shareholder approval of Cosmopolitan's exchange of the stock of its life insurance subsidiary for 260,980 shares of 20th Century Corporation stock. After denial of Leib's motion for preliminary relief and consummation of the transaction, the suit was consolidated with an earlier "class and derivative" action instituted by Ruth C. Leib, a shareholder of Goldchip Funding Company (Goldchip). Goldchip is an inactive corporation whose sole asset is approximately one-third of Cosmopolitan's outstanding stock. Lyman and Ash, equal partners in the law firm of that name, were counsel in both cases.

Following completion of the "challenged exchange," plaintiffs filed amended complaints seeking recision of the transaction and damages. They asserted various direct and derivative claims against 20th Century, its chief operating officer, and certain former officers and directors of both Cosmopolitan and Goldchip.[3] Although the record reflects some procedural confusion as to the direct or derivative nature of the various claims, it is clear that in January of 1974, following a demand for action upon the board of directors by Lyman and Ash, F. R. Civ. P. 23.1, Cosmopolitan hired its own counsel and began to assert its own rights against 20th Century and its chief operating officer. Later, on March 29, 1974, two classes composed, respectively, of the shareholders of Cosmopolitan and Goldchip were certified under Rule 23 of the Federal Rules of Civil Procedure (162-64a).

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[3] Jurisdiction was based, *inter alia,* on section 27 of the Securities Exchange Act of 1934, as amended, 15 U. S. C. § 78aa.

In one of the first documents filed by Cosmopolitan's attorneys, the corporation explicitly reserved "its right to object to . . . the amount and source of attorneys' fees, if any, which may be awarded to plaintiffs' counsel . . . ."[4] And on February 17, 1974, the district court strongly cautioned Lyman and Ash that any application for fees or reimbursement would have to be supported by full and detailed documentation. The court stated:

> "All right. Now, . . . I don't know whether I have said this before—if I have, I am going to say it again—if this Court is ever going to be asked to award any counsel fees, I will only do it if there be submitted a full documentation, and by that I mean the dates on which the services are rendered, what services were rendered on each date, how much time was spent on each date, what attorney rendered the service, and what his regular hourly rate is.
>
> "And I recognize that there are other factors such as the amounts involved and the degree of success. But I decided when I came on this bench, I would never award counsel fees unless I had such backup material. And I feel very strongly about it. And the best way to get counsel to understand it is that it is going to have to be done. I just want to throw that out as a cautionary admonition."[5]

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[4] Memorandum of Law of Cosmopolitan Funding Co., Document 121, filed February 25, 1974 (M. D. Pa. Civil No. 73-551).

[5] See transcript of hearing on February 17, 1974, Document No. 347 (M. D. Pa. Civil No. 73-551), at page 7. This warning was reiterated on one other occasion whan appellants' documentation was found inadequate. See letter of August 7, 1974, from Judge Muir to Mr. Lyman, reproduced at 1702a.

The litigation proceeded generally along two fronts with varying degrees of participation by appellants. With respect to certain of the individual defendants, Lyman and Ash worked primarily alone. And by June 1974, they were able to arrange a tentative settlement of $25,000. (871a, 1542-43a, 1602-05a). Appellants' role with respect to 20th Century, on the other hand, was less significant. Negotiations during the early spring of 1974 were conducted in large part by counsel for Cosmopolitan (870a, 2906-09a). These negotiations led to an offer by 20th Century to settle the various claims asserted against it and its chief operating officer by giving Cosmopolitan $15,000. cash and an additional 40,509 shares of 20th Century common stock. Cosmopolitan accepted the offer and on August 28, 1974, one day before trial, Cosmopolitan and 20th Century filed a settlement document reflecting the agreed upon terms.[6] During this period, Lyman and Ash showed no inclination to accept anything approximating the proposed settlement.

On the fifth day of trial, however, a settlement acceptable to Lyman and Ash was finally reached. The terms of the settlement closely resembled those Lyman and Ash had continuously rejected, except that the final agreement introduced the concept of "special preference units."[7] As before, Cosmopolitan was to receive $15,000. cash plus an additional 40,509 shares of 20th Century stock. Rather than common voting stock, however, the shares, denominated "special preference units," were non-voting securities with certain conditional conversion privileges. In addition, Cosmopolitan was to exchange the 260,980 shares, or a 15% block, of 20th Century common stock it had received in the "challenged transaction" for an identical number of "special preference units." A further provision in the settlement required Cosmopolitan, in effect, to relinquish its voting rights in the 10% block of 20th Century common stock it had owned prior to this litigation.

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[6] The settlement agreement was accompanied by a memorandum of law claiming that the class lacked standing to challenge the settlement because the settled claims were derivative, rather than direct, in nature (547-52a). We express no opinion on this question.

[7] See note 24 below for a complete description of special preference units.

On November 18, 1974, after the court had approved the settlement, Lyman and Ash presented petitions for award of counsel fees and reimbursement of expenses. The court examined the petitions (1551-63a), and set the matter for trial on December 3, 1974.

Prior to trial, Lyman and Ash filed amended petitions seeking $75,000. in counsel fees and $10,427.86 in expenses. In their petition for fees and accompanying affidavit, Lyman and Ash claimed to have spent, respectively, 674.4 and 599.8, or a total of 1274.2, "identifiable" hours prosecuting the consolidated actions. After increasing the number of "identifiable" hours by 25% to reflect what they considered the actual amount of time they had devoted to the case, appellants, using hourly billing rates of $50.00 and $60.00, selected the $75,000. sum "in their discretion" based on a number of factors (2642-54a).

Following nearly four days of hearings on the petition for fees and three days of hearings on the petition for expenses, the district court entered an order awarding $3,000. in attorneys' fees and $6,256.72 in expenses, or 60% of the $10,427.86 of expenses claimed. In support of this award, the trial judge on March 28, 1975, filed an 81-page opinion and order, comprised of 298 findings of fact, 20 conclusions of law, and a 17-page discussion. In that opinion, the court stated that it had found appellants' time records and books of account unreliable and their live testimony in support of their petitions unacceptable. Although it was unable to determine the precise number of hours actually expended on the suit, the district court considered the other factors set out in our opinion in *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 487 F. 2d 161 (3d Cir. 1973) (Lindy I), and concluded that appellants' efforts were worth $6,000.

Finally, based on his view that appellants' conduct was of questionable propriety (see pages A34-A36 below), the district judge reduced the $6,000. to $3,000. In addition, he instructed the Clerk to forward a copy of his opinion and order to the Disciplinary Board of the Supreme Court of Pennsylvania (863a).

Lyman and Ash and the named plaintiffs in the consolidated actions immediately appealed the district court's order. After requesting the trial judge to withhold publication of his opinion pending determination of the initial appeals, Lyman and Ash filed an "appeal" from the district court's June 18, 1975, order which formally denied such request and which reaffirmed that court's intention to publish its opinion (909a). This "appeal" was accompanied by a motion for a preliminary stay of publication (2973-91a). We granted that motion pending decision on the merits of the consolidated appeals (2992a). See note 2 above.

II. *The Contentions*

Appellants raise three broad challenges to the district court's award of fees and expenses and its decisions to publish its opinion. First, they challenge the court's finding that their petitions and testimony were insufficient to meet their burden of proof under *Lindy* I. They also argue in this context that the district court was biased and predisposed to find against them. Second, they contend that the ultimate award of fees and expenses was unreasonably low and an abuse of discretion. Finally, they assert that publication of the district court's opinion under the circumstances of this case would constitute a denial of due process of law.

III. *The District Court Findings*

In *Lindy* I we established guidelines for use in computing reasonable attorneys' fees which require the district court initially to determine "how many hours were spent in what manner by which attorneys." *Lindy, supra,* 487 F. 2d at 167. The burden of producing records and/or testimony on which a court may base such a determination rests squarely on the attorneys seeking compensation for their services. See *In re Meade Land and Development Co.,* 527 F. 2d 280 (3d Cir. 1975). Our initial task then is to decide whether the district court's finding that appellants' petitions and testimony were insufficient to carry that burden is clearly erroneous.

A. *The Petitions and Supporting Testimony*

Appellate review of findings of fact is governed by F. R. Civ. P. 52(a), which provides in part:

> "Findings of fact shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."

As the language of the rule itself suggests, the clearly erroneous standard applies with particular force where, as here, the district court's pertinent findings rest almost entirely on its observation of witnesses.[8] In such cases a finding must be affirmed unless it "(1) is completely devoid of minimum evidentiary support displaying some hue of credibility or (2) bears no rational relationship to the supporting evidentiary data." *Krasnov v. Dinan,* 465 F. 2d 1298, 1302 (3d Cir. 1972); see *Bluebird Food Products Co. v. Baltimore & Ohio R. Co.,* 474 F. 2d 102, 107 (3d Cir. 1973); 9 Wright & Miller, Fed. Prac. & Proc., Civil §2585 at 733-34 (1971). After a thorough review of the entire record, we cannot say the district court's critical findings as to the petitions and Lyman and Ash's supporting testimony are clearly erroneous. We must, therefore, agree that the petitions themselves cannot serve as the basis for an award in this case.

Appellants seek counsel fees for a time period beginning September 15, 1973, and ending November 14, 1974. As we have already noted, they were advised by the district court early in this litigation that they would be required to substantiate each requested item in any petition for counsel fees or expenses by indicating the service rendered, the date rendered, the time spent and the hourly rate for the attorney involved. Despite this clear warning, and despite our October 31, 1973, decision in *Lindy* I, neither Lyman nor Ash made any effort to keep a record of the time he spent on this litigation prior to June 23, 1974 (2244a, 2778a).

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[8] In the words of the district judge, the court ". . . applied the time-honored tests for determining [appellants'] credibility as witnesses, including their attitudes, demeanor, and behavior while on the stand, their interests in the outcome of the proceedings, their inclination to speak truthfully or not, the probability or improbability of their statements and all other facts and circumstances in evidence." (845a)

All of the hours alleged to have been spent and all of the expenses incurred between September 15, 1973, and June 1974 are estimates reconstructed from memory as refreshed by a review of documents, the court docket, correspondence and other materials in the office of Lyman and Ash (2255-57a, 2778a). These hours account for more than one-third of the total "identifiable" hours billed in this case.

While we do not hold that, under all circumstances, contemporaneous time records are required, reconstructions of the type involved here inspire little confidence as to their accuracy and invite the closest scrutiny. Where an attorneys' records do not prove to be reasonably accurate, they may properly be discounted as failing to satisfy the "strict standard" enunciated in our cases. See *In re Meade Land Development Co.*, 527 F. 2d 280, 284 (3d Cir. 1975).[9] We stress, as we did in that case,

"that it is the attorney's obligation to keep and submit to the court time records supporting an application for compensation. And, absent unusual circumstances, it is the court's independent obligation to give credit only where there are

such supporting documents, even in cases where no interested parties raise objections to the claim."

The close scrutiny mandated by the lack of pre-June 23 time records was also warranted with respect to the "contemporaneous" time records maintained after June 23, 1974. Mr. Lyman and Mr. Ash both testified that their post-June entries were sometimes made at the end of several days or a week for the preceding period (2810-11a, 2244a). All of Mr. Lyman's records were "approximate" because he usually rounded off to the nearest hour or half-hour (2245a).[10] Some of Mr. Ash's records for this period were missing (2778-79a). And, for one day, Mr. Ash produced two "contemporaneous" records; one showed two hours devoted to this case while the other showed eight hours, or four times that amount (805a).

The dissatisfaction understandably engendered by the quality of the time records and the high number of billable hours on particular days was confirmed when the court examined the particulars of the petitions in detail.[11] By way of illustration only, we note the following examples. Mr. Lyman's petition showed two hours for "correspondence" on August 5, 1974. The product of these two hours is two one-sentence letters, one two-sentence and one six-sentence letter (979-81a, 1069a). None of these letters required extensive preparation.

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[9] We recognize that this "strict standard" has only been announced in the bankruptcy context where the district court has special independent obligations. However, we believe the district court's role in the *Lindy* context is sufficiently analogous that similar standards should apply. See page A24 *infra*.

[10] Aside from travel time and time spent in conference, all but one of the 224 line items in Mr. Lyman's petition show time spent in even hours or half-hours. Substantially the same observation can be made of Mr. Ash's petition.

[11] Of course, "[i]t is not necessary to know the exact number of minutes spent nor the precise activity to which each hour was devoted." *Lindy, supra*, 487 F. 2d at 167. However, where time records are compiled in the manner shown in this record, inability to justify specific entries is highly relevant on whether the records as a whole are a sufficiently reliable source for the computation of reasonable fees under *Lindy*.

Similarly, the petition indicates that well over 20 hours was spent preparing a simple two-page motion for a continuance and a brief five-page supporting memorandum (2549-51a, 238-43a). The district court understandably expressed surprise at the amount of time allegedly invested in this short, uncomplicated motion (2549a). That appellants sought fees in excess of $1,000. for this motion provides support for the district court's findings.

Finally, we think there is a rational basis in the record for discounting much of appellants' live testimony. While it is difficult to evaluate the cold record in this regard, we have concluded the transcripts contain a number of answers the district court could fairly characterize as "evasive" or inconsistent.[12]

B. Alleged Bias as Affecting Rulings on Petitions Claiming Fees and Expenses

Closely related to appellants' contention that the district court erroneously disregarded their petitions is the argument that the district court was "predisposed" against appellants. This contention was first raised on the morning of the third day of hearings. During the testimony of appellants' part-time bookkeeper, the court stated, "I think it is only fair to tell

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[12] See, *e.g.*, 1695-96, 1844-45, 2240, 2314, 2348, 2356-57, 2382-84, 2392-94, 2395-96, 2397, 2414-20, 2601, 2602-05, 2697, 2707, 2744-45, 2790, 2793-95, 2817-22, 2831-32a. Compare 1648a with 1884-86a.

you, Mr. Lyman and you Mr. Ash, that I am very troubled as to whether or not there has been an attempt to perpetrate a fraud on this court by you gentlemen" (2022a). This statement and the court's initial reaction to appellants' books prompted Lyman and Ash to move that the court recuse itself because of "bias against plaintiff's counsel." Appellants also sought "permission to voir dire Your Honor with respect to Your Honor's comments about the attempted perpetrated fraud . . . ." (2048a). Both motions were denied, and a subsequent written motion under 28 U. S. C. § 144 was denied by a written order and opinion dated December 19, 1974 (672-77a).

We have carefully reviewed the entire record bearing this contention of bias in mind and, on the basis of that review, we reject such contention.

In *Lindy* hearings the role of the district judge is unusual for the court is frequently the sole representative of a class whose interests are at that stage divergent from those of their former attorneys. Especially in class actions, attorneys as a practical matter often have nearly unbridled discretion as to the fees and expenses incurred during the course of the litigation. The need for some form of safeguard against possible abuse of the equitable fund doctrine is therefore great. Although the class may have its own representative at the hearing, the district court has the prerogative to play a more active role than it might in a jury or other context. *Cf. In re Meade Land and Development Co.*, 527 F. 2d 280 (3d Cir. 1975). In carrying out its obligation, the district court has a broad discretion, which includes the power to examine witnesses and to require production of supporting documents.[13]

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[13] The only instance where we think the district court's participation approached the bounds of impropriety was when it *sua sponte* required production of appellants' partnership tax returns (2470-72a).

In our view, the record reflects the efforts of the district court to carry out, seriously and conscientiously, the independent duty imposed upon it by our decision in *Lindy* I. As the district court stated in its order denying the motion for recusal (674a):

> "It is to be noted, of course, that no jury is involved in this case and that the proceeding is equitable in nature. Attorneys coming into court for an award of attorneys fees from a fund . . . are in a fiduciary capacity and the judge has the obligation to examine the application in the same manner as a judge approving an expense of any other fiduciary.
>
> "The instances of bias cited by the attorneys in this case, taken as true and as made in good faith, show no more than the [district] judge fulfilling his responsibility."

We have already noted that the district court's concern with its duty to determine fees and expenses started early in this case and well before it became aware of the manner in which Lyman and Ash maintained their records or compiled their petitions seeking attorneys' fees.

Appellants rehearse a litany of charges on some of the district court's 298 findings. Most of their challenges are without merit.[14] Although we must agree that there are instances not discussed elsewhere in this opinion where minor errors were made, we cannot in this case infer bias from the mere fact that the district court, working without the benefit

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[14] *E. g.*, the fact that Mr. Ash had conducted hundreds of non-jury trials is not inconsistent with the finding "that neither Lyman nor Ash had ever tried a case to a jury and neither had ever tried [an injunction] case beyond the preliminary injunction stage" (849a). See also 2575-76a, 2397-98a, 2623a.

of a transcript,[15] made mistakes in its opinion. Similarly, we think the district court's initial expression of surprise at the amount of the requested awards (1563a) and the court's previously quoted remark that it was "troubled" about a possible attempt to defraud the court (2022a) were largely motivated by a desire to be fair (675a, 2022a) and, in any event, established no bias.[16]

As the Supreme Court stated in *United States v. Grinnell Corp.*, 384 U. S. 563, 583 (1966):

> "The alleged bias and prejudice to be disqualifying must stem from an extra-judicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case. *Berger v. United States*, 255 U. S. 22, 31."

None of the instances of alleged bias indicate any extra-judicial influence or animus.

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[15] We reject as frivolous the argument that the trial judge committed reversible error in making his findings on the basis of notes taken during the hearing. Appellants' brief at 31, 32, 36. We also note that appellants answered in the negative when asked if they desired to submit proposed findings (2944a).

[16] Appellants cite two instances to us as evidence that the district court had made up its mind before hearing the evidence. One involves the trial judge's questions about the integrity of accounts kept in pencil (2020-22a). The other involved his initial concept that appellants had erroneously computed the amount of tax on their telephone charges (1811-12a, 1905-06a, 2085a, 2094a, 2500-01a, 2925a). In both instances the court dropped the matter entirely when its initial doubts proved wrong. We note in this context that the cases cited at page 62 of appellants' brief relating to the propriety of predicating decisions on facts outside of the record or "private evidence" are inapposite since no part of the decision in this case was based on such evidence.

IV. *The Amount of the Awards*

A. Attorneys' Fees

In Lindy we established an analytical framework for the computation and award of attorneys' fees. As we explained in *Merola v. Atlantic Richfield Co.*, 515 F. 2d 165, 168 (3d Cir. 1975) (Merola II):

> "*Lindy* approached the award of attorneys' fees by requiring that initially an objective basis for evaluating attorneys' services be established by multiplying the hours spent on a case by a reasonable hourly rate of compensation for each attorney involved. With this objective figure as a backdrop, *Lindy* injected flexibility into the fee-setting process by requiring that the value of the services be finally determined by consideration of at least two additional factors: (1) the contingent nature of the case, reflecting the likelihood that hours were invested and expenses incurred without assurance of compensation and (2) the quality of the work performed as evidenced by the work observed, the complexity of the issues and the recovery obtained."

Since the trial judge in this case failed to make any findings on the number of hours expended by Lyman and Ash in this litigation, we would normally remand for such a determination. However, it is apparent that the trial judge has already made a diligent effort and has compiled as complete a record as is possible under the unique circumstances of this case. As noted below at page A28, the record contains evidence, which is not disputed by any party, that 700 hours were spent by counsel for the individual defendants for comparable work. Only because this is a most unusual case,[16a] with a virtually complete lack of reliable direct supporting documentation and involving relatively inexperienced attorneys, with no full-time secretaries or other record-keeping personnel, who testified at length before a conscientious district judge, we will not follow our normal policy of requiring the district court to make the determination of hours expended in the first instance. While judicial economy in the attorneys' fee context normally requires a remand, we believe that in this extraordinary case it would be wasteful of the resources of both the parties and the courts to follow that course. A remand here would only cause a further drain on Cosmopolitan's depleted treasury when this litigation has already generated claims for attorneys' fees that may exceed it. Under these circumstances, we have decided to adopt appellants' suggestion that we determine a reasonable fee at this juncture. Appellants' brief at 66-67. See *Powell v. Pennsylvania Railroad Co.*, 267 F. 2d 241 (3d Cir. 1959); *cf. Merola v. Atlantic Richfield Co., supra,* 515 F. 2d at 173.

[16a] In addition to the fact that the absence of (a) records, (b) reliable testimony from appellants, and (c) other direct evidence of hours spent by appellants on this case, makes it wasteful for all concerned to remand this case to the district court for a finding of such hours, our view that the Pennsylvania Disciplinary Board is the appropriate agency to determine, in the first instance, the application of the Code of Professional Responsibility to this record (see pages A36-A40) has contributed to our conclusion that we should take the highly unusual course of not remanding the case to the district court. See *Lindy Bros. Builders, Inc., et al. v. American Radiator & Standard Sanitary Corp., et al.* (Lindy II), ... F. 2d ...... (July 2, 1976, 3d Cir. Nos. 74-2189 & 74-2255) (en banc). We note that parts IV A - C of *Lindy II* do not apply to this fee application adjudicated in the district court on March 28, 1975, more than a year prior to *Lindy II*. The Pennsylvania Disciplinary Board has indicated that it will not act on the reference of the district court case and opinion to it until the above appeals have been determined.

The threshold determination we must make is the amount of time Lyman and Ash spent prosecuting these suits. The record indicates that counsel for the individual defendants in this litigation spent approximately 700 hours (1605-10a). Counsel for 20th Century spent somewhat more (835-37a). Because of their failure of proof[17] and the fact, discussed below, that appellants' refusal to settle the claims against 20th Century at an earlier time accounts for a large portion of the time spent by counsel for 20th Century, we think the 700-hour figure represents an acceptable starting point for the *Lindy* computation.

Next we must set the value of Lyman and Ash's time on an hourly basis. In *Lindy, supra,* 487 F. 2d at 167, we said:

> "The value of an attorney's time generally is reflected in his normal billing rate. A logical beginning in valuing an attorney's services is to fix a reasonable hourly rate for his time—taking account of the attorney's legal reputation and status (partner, associate)."

The difficulty in this case stems from the fact that Lyman and Ash's practice was confined almost exclusively to cases handled on a contingent fee basis. Only in a few scattered instances did Lyman and Ash bill on an hourly basis at the $50.00 and $60.00 rates they claimed (2624-25a, 2821a, see 2420-21a, 2423). Thus we must fix a "reasonable hourly rate" taking account of appellants' legal reputation and experience.

Prior to these suits, Lyman and Ash had had little previous experience as lead counsel in the type of litigation involved in

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[17] *Cf. Merola v. Atlantic Richfield Co.,* 493 F. 2d 292, 296 & n. 14 (3d Cir. 1974) (Merola I).

this case (820-30a, 2397-98a, 2575-76a, 2623a). Although Mr. Ash's experience was more extensive, Mr. Lyman had been a practicing member of the bar for less than two years prior to this litigation. The pretrial papers he prepared in this case were the first he had ever done (2575-76a). Taking into account the prevailing rate of compensation in the legal community[18] and the facts at the time of this litigation,[19] we have determined, after careful consideration, that the figure of $40.00 per hour represents an appropriate, weighted, average rate of compensation for these attorneys in this type of litigation at the time. Multiplying the 700-hour estimate discussed above by $40.00 per hour, we arrive at a threshold attorneys' fee of $28,000.

Our next inquiry concerns the question of whether this $28,000. figure should be adjusted to reflect the contingent nature of this case. Although the litigation was conducted on a wholly contingent basis, the prospects for success on the proxy claim became substantial soon after the litigation commenced and before any significant amount of legal time had been spent (847-48a). Moreover, an experienced and respected member of the Philadelphia bar, who acted as counsel for the individual defendants, testified that his client had settled principally because the cost of defending against the suit would have been greater than the $25,000. paid in the settlement (1542-43a, 1601-05a). Under these circumstances, the policies militating in favor of a substantial increase to reflect the contingent nature of the suit apply with diminshed force. And given the small amount of the actual monetary recovery, we think the objective figure of $28,000. should be increased by no more than 10% for a total of $30,800.[20]

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[18] The district court set the rates at $20.00 per hour for non-trial time and $30.00 per hour for trial time.

[19] At the time of the litigation, the firm of Lyman and Ash was new, had limited library facilities and limited secretarial or clerical assistance. The overhead component of their fee was, therefore, smaller during the period than that of lawyers in existing firms.

We now turn to the question which the district court found to be of paramount importance: whether the fee should be reduced to reflect "the quality of the work performed as evidenced by the work observed, the complexity of the issues and the recovery obtained." *Merola v. Atlantic Richfield, supra,* 515 F. 2d at 168. We cannot say the district court abused its discretion in determining that a reduction in fee is warranted in this case.

First, there is sufficient evidence in the record to support the district court's finding that the quality of appellants' actual work was substandard. Prior to trial, the district judge so characterized their work, and the record reflects the court's concern at other stages in the litigation.[21] Second, we must agree with the district court's conclusion that "nothing should be added in this case for the novelty or complexity of the issue" (849a). Although the case was procedurally complex, we do not believe those complexities increased the difficulty of obtaining the settlements achieved in this litigation.

More significantly, we think a reduction in the objectively determined fee is appropriate in light of the result achieved through appellants' efforts.

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[20] The district court used an increase factor of 20% but was considering a fee that was lower than the fee we are considering here (851a).

[21] Order of November 26, 1973, Document No. 48 (M. D. Pa., Civil No. 73-551); letter of August 7, 1974, from Judge Muir to Mr. Lyman (882a).

The principal monetary benefit produced by appellants was the $25,000. settlement against the individual defendants. [21a] As we have previously noted, that settlement was achieved in principle by June. By appellants' own records, they had expended approximately 425 hours on this litigation by that time. Thus, using the hourly rate of $40.00, plus a contingency factor of 10%, the maximum possible fee for producing this $25,000. settlement would be $18,700., assuming all the hours were spent on this aspect of the litigation.

The only other benefit produced by this litigation came from the settlement with 20th Century. That settlement consisted of $15,000., 40,509 special preference units and the conversion of 260,980 shares of Cosmopolitan's 20th Century common stock into an identical number of special preference units.[22] The fact is, however, that Lyman and Ash cannot be credited with the full value of their time for producing this benefit.

First, it is undisputed that the entire settlement without the special preference feature was (1) attainable at least by the end of 1973 (833a), and (2) would have been achieved but for the opposition of Lyman and Ash (834a).[23] By that time Lyman and Ash claim to have expended only 212.4 hours,[23a] or one-sixth of the time for which they now seek attorneys' fees. Using the $40.00 per hour rate, plus a 10% contingency factor, they would thus be entitled to a maximum fee of $9,355.60. Furthermore, counsel for Cosmopolitan played the significant, if not exclusive, role in arriving at the initial terms of the settlement ($15,000. cash plus 40,509 additional shares) (833a, 870a, 2906-09a).

[21a] We have concluded that the district court finding that Lyman and Ash did not produce this $25,000. sum is clearly erroneous. See 871a, 1542-43a, 1602-05a, and page A15 above. The difference between the fee we have set and the $6,000. fee set by the district court reflects this conclusion.

[22] Appellants correctly point out that in its description of the settlement the district court failed to mention the conversion of the 260,980 shares of common stock into special preference units (831a). We add the observation that the district court also failed to mention the loss of voting rights. We doubt the district court was unaware of either of these facts. In any event, the court found special preference units to have limited value.

Second, the bulk of appellants' time was expended in changing the 40,509 shares into 40,509 preference units and arranging the conversion of Cosmopolitan's 260,980 shares of

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[23] Opposing counsel testified:

> "[W]hile the other parties to this transaction were willing as far back as November and December of 1973, and certainly in early 1974, to sit down and negotiate a settlement, and a settlement that was within the range that we ended up with, there was no inclination on the part of Mr. Lyman or Mr. Ash to accept figures anywhere near what we ended up with until the case was well into I think about the fourth or fifth day of trial." (2909a)

Immediately following this testimony, Mr. Lyman refused an opportunity explicitly extended by the court to cross-examine. See also reply brief at 9. Mr. Lyman testified that a settlement identical, except for the preference units, to the settlement finally approved "could have been had at any time after the suit was filed" (2311a).

While this testimony does not reveal a precise date after which the ultimate settlement, except for the preference units, could have been attained, it does indicate that the settlement, without the preference units, was attainable by the end of 1973.

[23a] It should be noted that these 212.4 hours have already been included in the 425 hours covered by the computation of time spent as of June 1974 on the settlement with the individual defendants described at the top of page A31 above. This $9,355.60 computation assumes that these 212.4 hours were spent solely on the claims against 20th Century.

20th Century stock into special preference units. While it is clear that the preference feature[24] has "some value" (1593a), we are unable on this record to translate that value into monetary terms and we must, therefore, agree with the district court that appellants have failed to sustain their burden of proof. Without belaboring the point, it is enough to state that other than their present worth in terms of peace of mind, the value of the preference units is linked directly to the future of 20th Century and the likelihood that certain adverse conditions will occur. But the only expert to testify concerning the value of the preference feature offered no prediction concerning 20th Century's prospects. The expert's testimony was based on the premise that these conditions would occur.[25]

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[24] Special preference units of 20th Century are non-voting shares convertible under certain conditions to securities and created especially for the settlement. They have the following characteristics:

(1) In the event, prior to September 15, 1979, of (a) a decline in 20th Century's net worth below $2 million, (b) a formal adjudication of the bankruptcy of 20th Century or Consumers Life (a subsidiary), or (c) appointment of a statutory receiver for Consumers Life, the units will automatically convert into general debt obligations at $4.21 per unit.

(2) In the event the above conditions do not occur before September 15, 1979, and a principal subsidiary of 20th Century possesses a certificate of authority to operate as a life insurance company on September 15, 1979, the units will convert to common stock. See Settlement Agreement, ¶ II-D(3) (573a).

(3) If a principal subsidiary of 20th Century does not possess a certificate of authority to operate as a life insurance subsidiary on September 15, 1979, the units will not convert until (a) recertification triggers conversion into common stock, or (b) bankruptcy, receivership, a decline in net worth below $2 million, or the occurrence of January 1, 1985, without recertification triggers conversion into debt.

In addition, the units are (a) convertible into common stock at the option of the holder (Cosmopolitan) and (b) convertible into debt at $4.21 per unit at the option of 20th Century.

Moreover, whatever value the preference feature has must be weighed against the fact that preference units, unlike the common stock for which they were substituted, have no dividend rights. More significantly, as a part of the change in the settlement Lyman and Ash accomplished, Cosmopolitan effectively relinquished all voting rights in 20th Century although Cosmopolitan held a 25% equity interest in the company.

In sum, the total benefit produced by Lyman and Ash consists of (1) $25,000. from the settlement with the individual defendants, (2) a small portion of the $15,000. cash and 40,509 additional shares received from 20th Century, and (3) the conversion of common stock into special preference units, a benefit to which no precise value was ascribed on this record. Taking the size of these benefits into account, we conclude that the objectively determined fee of $28,000., after being increased by 10% to $30,800. to reflect the contingent nature of the suit, will be reduced by 50% to $15,400.

We decline to reduce the fee as a penalty for any attempt to "defraud" the court. In our view, the evidence falls short of establishing by "clear, precise and indubitable evidence"

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[25] The expert stated: "[i]n the aggregate *if the adverse conditions do occur*" (emphasis supplied), the value of the special preference feature will be the difference between "the basic book value" at the time and $4.21 (1594-95a). As noted above, the present value of the preference feature depends on the likelihood those conditions will occur. The record contains no evidence on either such likelihood or the monetary value of the preference units which might be compared to the market value of the common stock. Sales of the common stock apparently do occasionally take place when buyers and sellers can be matched.

willfulness or intent to deceive on the part of appellants. See *Ratay v. Lincoln National Life Ins. Co.*, 378 F. 2d 209, 212 (3d Cir. 1967). Nor can we say that the present record[26] justifies the district court's conclusion that there has been a "clear violation" by appellants of Disciplinary Rule 5-103(B), since Lyman and Ash were not given an opportunity to present evidence in opposition with knowledge that they were being charged with an infraction of that Rule. It is possible that appellants could have shown that their clients remained "ultimately liable for" the expenses of litigation.

B. Expenses

After reviewing the entire record, the district court decided to award 60%, or $6,256.72, of the $10,427.86 amount requested by Lyman and Ash. We cannot say that this award was contrary to law or that the findings on which it is based are clearly erroneous.[27] In our view, the district court was entitled to reduce the total of awardable expenses to take account of (1) unreimbursable items and (2) poor records.

While it is impossible on this record to determine the precise amount of such expenses, it is apparent that some of the items in the petition are unreimbursable, since they would normally be subsumed in the hourly billing rate. Among these are: a portion of the legal research copying expenses necessitated by the fact that Lyman and Ash had no library, expenses for "clerical" and other in-office overhead charges. Under the circumstances of this case, the district court did not abuse its discretion in denying reimbursement at least for some portion of the expenses attributable to "Dinners for staff (o.t.)."

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[26] See transcript of hearing on February 17, 1974 (M. D. Pa. Civil No. 73-551), Document No. 347 at 73-77 (testimony of R. Leib); transcript of hearing on February 28, 1974 (M. D. Pa. Civil No. 73-551), Document No. 345 at 31-34 (testimony of A. Yenchko); 1282-83a; 1292-93a; 1303a.

[27] We note that during the trial appellants expressed a willingness to accept 75% of the expenses claimed (2162a, see also 2173a). The district court was entitled to conclude that, under the unique circumstances of this case, some portion of the pre-trial and trial expenses, such as witness fees and notes of testimony, cannot be termed reasonable and necessary. *Cf. In re Middle West Utilities Co.*, 17 F. Supp. 359, 375 (S.D.N.Y. 1936).

Similarly, we believe appellants must bear the risk of uncertainty arising from the poor quality of their records, Appellants, for example, claim to have made 3,000 copies of documents on their firm's copier and seek reimbursement at 5¢ per page. But the 3,000 copy figure and 5¢ per page charge represent little more than a guess "hurriedly" arrived at (1719a). Telephone and travel charges present analogous difficulties. Credit cards were used to pay some travel expenses, and while expenses clearly were incurred, allocation to this litigation was often based on appellants' memory (916-17a, 1632-34a, 1799a). Appellants maintained no records of out-of-pocket expenses (789a). The same problems attend analysis of the firm's telephone records. Telephone charge allocations for the first 11 months of this case were first made in July and August of 1974 and thereafter on a monthly basis only (1903-94a, 1910a).

V. *The District Court's Opinion*

In its final order on March 28, 1975 (863-64a) and in a supplementary order entered June 18, 1975 (868-69a), the district court directed the Clerk to forward a copy of its opinion in

this case to the Disciplinary Board of the Supreme Court of Pennsylvania and to the West Publishing Company. As we have previously noted, that opinion contains language which may injure appellants' professional reputations. Appellants have asked this court to order the withdrawal of the opinion and to direct that the opinion and order, or parts thereof, be expunged from the district court's files.[28]

In the absence of extraordinary circumstances, every court has the authority and the necessarily broad discretion to write and to file its own opinions and orders relating to questions properly presented to it.

Moreover, courts have the duty to assist the appropriate state disciplinary bodies in carrying out their responsibility of investigating activities which may be contrary to the canons of ethics and a source of injury to the public. We note, however, that the Supreme Court has "advised caution '[w]here a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him . . .' " *Doe v. McMillan*, 412 U. S. 306, 324 (1973), quoting *Wisconsin v. Constantineau*, 400 U. S. 433, 437 (1970).[29] In our view, such caution is warranted in cases such as this. In *Lowenschuss v. West Publishing Co.*, 402 F. Supp. 1212 (E. D. Pa. 1975), appeal docketed at No. 75-2431, 3d Cir., Nov. 18, 1975, a district judge in a footnote to a published opinion referred a factual question which bore on the propriety of an attorney's involvement in a case to "the appropriate body of the Pennsylvania Bar." *Lowenschuss v. Kane,* 367 F. Supp. 911, 913 n. 1 (S. D. N. Y. 1973). The adverse implication of this action on the attorney's reputation proved to be unfortunate because the Disciplinary Board subsequently absolved the attorney of any unethical conduct.

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[28] We have concluded that the June 18 order is an appealable, final order, and we will therefore deny Cosmopolitan's September 25, 1975, motion to dismiss.

[29] We assume, without deciding, that an attorney has a liberty or property interest in his professional reputation. *Cf. Paul v. Davis*, ... U. S. .... (44 U. S. L. W. 4337, March 23, 1976).

In light of the Supreme Court's admonition quoted above and *Lowenschuss,* although it is proper to refer materials bearing on possibly unprofessional conduct requiring disciplinary action to the recognized state disciplinary body,[30] we think it is preferable that the district court avoid unnecessary public comment upon alleged misconduct, at least until discipline, if any, has been finally imposed.

This procedure would insure that charges of misconduct can be determined and appropriate sanctions, if any, chosen and imposed by those best equipped to deal with the Code of Professional Responsibility. It avoids, as well, any conflict with the spirit of Rule 17-23 of the Pennsylvania Rules of Court, which provides:

> "All proceedings involving allegations of misconduct by or disability of an attorney shall be kept confidential until and unless the Supreme Court enters its order for the imposition of public discipline."

More significantly, it assures that the attorneys are accorded a due process hearing before an impartial tribunal that is

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[30] We do not, of course, question the power of the district courts "to discipline members of its bar independently of and separately from . . . disciplinary procedures of (a) the state courts and (b) this court." *In re Abrams,* 521 F. 2d 1094, 1101 (3d Cir. 1975) (en banc), *cert. denied,* 44 U. S. L. W. 3358 (Dec. 15, 1975).

preceded by written notice in the form of "a petition setting forth with specificity the charges of misconduct." Rule 17-8. Such procedural safeguards were not present in the district court and their absence increases the danger of mistake and the difficulties that attend publication of the district court's opinion at this juncture. See pp. A34-A36 above; *cf. Goss v. Lopez,* 419 U. S. 565 (1975).

In light of the foregoing we will direct that this opinion will only be distributed to the district court, counsel, and the Disciplinary Board until further order of this court.[31] Counsel are directed to preserve the confidentiality of this opinion and the district court opinion until this court enters such further order in the matter.

For the foregoing reasons, the figure "$15,400.00" will be substituted for "$3,000.00" in paragraph 1 of the March 28,

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[31] Unless the Pennsylvania Disciplinary Board fails to act with reasonable speed or some unforeseen event occurs, the court would normally await its decision.

1975, district court order and, as so modified,[32] the district court order will be affirmed.[33]

TO THE CLERK: Please file the foregoing opinion.

. . . . ,

Circuit Judge.

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[32] As modified, the district court order will provide:

"1. Cosmopolitan Investors' Funding Company shall pay to Lyman and Ash within 30 days as reasonable counsel fees $15,400.00.

"2. Cosmopolitan Investors' Funding Company shall pay to Lyman and Ash within 30 days as reimbursement for expenses incurred $6,256.72.

"3. Cosmopolitan Investors' Funding Company shall pay to Ruth C. Leib $400.00, shall pay to Frank Leib $20.00, and shall pay to Andrew Yenchko and Mary Yenchko $45.00 as reimbursement for their expenses in this case, all within 30 days.

"4. The Clerk shall transmit a copy of the Court's opinion filed today, and a copy of this order forthwith to the Disciplinary Board of the Supreme Court of Pennsylvania for such action, if any, as that Board deems appropriate.

"5. As soon as a transcript of the hearings on counsel fees and expenses is prepared, the Clerk shall transmit a copy thereof to the Disciplinary Board of the Supreme Court of Pennsylvania."

[33] As noted at note 28 above, Cosmopolitan's motion to dismiss the appeal will be denied.

Judgment

UNITED STATES COURT OF APPEALS
For the Third Circuit

Nos. 75-1596, 75-1597, 75-1598
and 75-1674

In the matter of
GOLDCHIP FUNDING COMPANY and
COSMOPOLITAN INVESTORS FUNDING COMPANY,

RUTH C. LEIB and FRANK B. LEIB, on their own behalf and on behalf of the classes of independent shareholders of GOLDCHIP FUNDING COMPANY and COSMOPOLITAN INVESTORS FUNDING COMPANY and derivatively on behalf of GOLDCHIP FUNDING COMPANY and COSMOPOLITAN INVESTORS FUNDING COMPANY, and its subsidiaries,

vs.

20TH CENTURY CORPORATION; JAMES C. ROBERTSON; ROBERT NELSON; ROBERT DI STEFANO; ALLEN C. SPANGLER; A. C. MURPHY; SHERNO RESEARCH CENTER, INC.,
Defendants,

and

GOLDCHIP FUNDING COMPANY,
COSMOPOLITAN INVESTORS FUNDING COMPANY,
Nominal Defendants,

Cletus P. Lyman, Esq. and Richard
A. Ash, Esq., counsel for plaintiffs,
Appellants in No. 75-1596,

Ruth C. Leib,
Appellant in No. 75-1597,

Frank B. Leib, Andrew Yenchko
and Mary K. Yenchko,
Appellants in No. 75-1598,

Cletus P. Lyman, Esq. and Richard
A. Ash, Esq.,
Appellants in No. 75-1674.

(D. C. Civil Action No. 73-551)

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT
For the Middle District of Pennsylvania

Present: VAN DUSEN, ADAMS AND ROSENN,
Circuit Judges.

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered March 28, 1975, be, and the same is hereby modified to substitute the figure "$15,400.00" for "$3,000.00" in paragraph one of the district court order, and the said order of the district court is in all other respects affirmed.

ATTEST:

THOMAS (Illegible), Clerk.

July 14, 1976

UNITED STATES COURT OF APPEALS
For the Third Circuit

Nos. 75-1596, 75-1597, 75-1598
and 75-1674

In the matter
of
GOLDCHIP FUNDING COMPANY and COSMOPOLITAN INVESTORS FUNDING COMPANY

RUTH C. LEIB and FRANK B. LEIB, on their own behalf and on behalf of the classes of independent shareholders of GOLDCHIP FUNDING COMPANY and COSMOPOLITAN INVESTORS FUNDING COMPANY and derivatively on behalf of GOLDCHIP FUNDING COMPANY and COSMOPOLITAN INVESTORS FUNDING COMPANY, and its subsidiaries

vs.

20TH CENTURY CORPORATION, JAMES C. ROBERTSON, ROBERT NELSON, ROBERT DI STEFANO, ALLEN C. SPANGLER, A.C. MURPHY, SHERNO RESEARCH CENTER, INC.,
Defendants,

and

GOLDCHIP FUNDING COMPANY,
COSMOPOLITAN INVESTORS FUNDING COMPANY,
Nominal Defendants.

Cletus P. Lyman, Esq. and Richard A. Ash, Esq., counsel for plaintiffs, Appellants in *No. 75-1596.*

Ruth C. Leib, Appellant in *No. 75-1597.*

Frank B. Leib, Andrew Yenchko and Mary K. Yenchko Appellants in *No. 75-1598.*

Cletus P. Lyman, Esq. and Richard A. Ash, Esq., Appellants in *No. 75-1674.*

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT
For the Middle District of Pennsylvania

Present: VAN DUSEN, ADAMS AND ROSENN,
Circuit Judges.

ORDER

The motion of Cosmopolitan Investors Funding Company for dismissal of the above-captioned appeal be, and the same is hereby denied.

ATTEST:

THOMAS (ILLEGIBLE)
Clerk.

Dated: July 14, 1976.

APPENDIX G

Order of the United States Court of Appeals for the Third Circuit, Dated July 11, 1975

UNITED STATES COURT OF APPEAL
For the Third Circuit

No. 75-1674
June 26, 1975

In the matter
of
GOLDCHIP FUNDING COMPANY and COSMOPOLITAN
INVESTORS FUNDING COMPANY

RUTH C. LEIB and FRANK B. LEIB, on their own behalf and on behalf of the classes of independent shareholders of GOLDCHIP FUNDING COMPANY and COSMOPOLITAN INVESTORS FUNDING COMPANY and derivatively on behalf of GOLDCHIP FUNDING COMPANY and COSMOPOLITAN INVESTORS FUNDING COMPANY, and its subsidiaries

vs.

20th CENTURY CORPORATION, JAMES C. ROBERTSON, ROBERT NELSON, ROBERT DI STEFANO, ALLEN C. SPANGLER, A.C. MURPHY, SHERNO RESEARCH CENTER, INC.,

Defts. in D.C.

and

GOLDCHIP FUNDING COMPANY, COSMOPOLITAN
INVESTORS FUNDING COMPANY,

Nominal Defts. in D.C.

Cletus P. Lyman, Esq., and Richard A. Ash, Esq., Appellants (D. C. Civil No. 73-551)

Appendix G—Order of the United States Court of Appeals for the Third Circuit, Dated July 11, 1975.

Present: VAN DUSEN, ROSENN and WEIS,
Circuit Judges.

1. Appellants' motion to stay District Court order dated June 18, 1975, of the United States District Court for the Middle District of Pennsylvania pending appeal, *with* document entitled "Copies of Parts of Record Essential, etc."

in the above-entitled case.

Respectfully,

M. QUINN FM
Clerk.

enc.
fm

The foregoing Motion to stay is granted pending the final determination of the above appeal and of any judgment entered by this court as a result of such appeal.

By the Court,

VAN DUSEN,
Judge.

Dated: July 11, 1975.

APPENDIX H

Order of the United States District Court Dated, June 18, 1975

UNITED STATES DISTRICT COURT
For the Middle District of Pennsylvania

In the Matter
of
GOLDCHIP FUNDING COMPANY AND COSMOPOLITAN INVESTORS FUNDING COMPANY,

RUTH C. LEIB, *et al.,*
Plaintiffs,
vs.
20TH CENTURY CORPORATION, *et al.,*
Defendants.

Civil No. 73-551
(Complaint Filed 9/27/73)
(Judge Muir)

ORDER

June 18, 1975

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

On May 31, 1975 Cletus P. Lyman on behalf of himself and Richard A. Ash applied to West Publishing Company to withhold publication of the opinion of this Court dated March 28,

1975. Mr. Lyman never applied to this Court to withhold publication of the Opinion. On June 5, 1975, James P. Corson of West Publishing Company replied to Mr. Lyman.

On June 12, 1975, James M. Marsh of LaBrum and Doak, counsel for Lyman and Ash, wrote West Publishing Company and also the undersigned judge. Copies of the correspondence are attached hereto. In the letter to the Court, Mr. Marsh requested that we withhold publication of the Opinion or in the alternative withhold decision on publication until the Court of Appeals has acted. He closed his letter of the same date to West Publishing Company with this sentence: "We must state to you, however, that if Judge Muir denies our request, we will hold your company fully accountable if you publish the opinion." In my view, these challenges to this court must be met head-on. Furthermore, the conduct of Lyman and Ash in this Court was such that I consider it my duty to alert other courts so that a reoccurrence may be prevented. The request that we withhold publication of the Opinion will be denied.

NOW, THEREFORE, IT IS ORDERED THAT:

West Publishing Company be and the same is authorized to publish the Opinion of this Court in the above case dated March 28, 1975.

MUIR,
United States District Judge.

Law Offices

LaBRUM and DOAK
1500 Seven Penn Center Plaza
Philadelphia, Pa. 19103

Telephone
215-561-4400

June 12, 1975

Re: *Leib v. 20th Century Corporation, et al.*
Civil Action No. 73-551

Honorable Malcolm Muir
United States District Court
Williamsport, Pa. 17701

Dear Judge Muir:

This firm has been retained to represent Messrs. Lyman and Ash in the appeal which they have filed from Your Honor's decision on their petition for allowance of fees and costs in the subject case.

The purpose of this letter is to respectfully request that Your Honor not cause West Publishing Company to publish your opinion or, in the alternative, that you withhold decision on publication until the Court of Appeals has acted. We believe Your Honor will agree that in all fairness to these lawyers, an opinion of the nature here involved should not be published at least until and unless that opinion has been affirmed by the Court of Appeals.

I enclose herewith copies of an exchange of correspondence between Mr. Lyman and West Publishing Company, wherein West states that it defers completely to the determination of Your Honor with respect to publishing of the opinion. By subsequent telephone call, West has advised that the opinion is still in the proof stages.

Respectfully yours,

LaBRUM AND DOAK,
By James M. Marsh,
James M. Marsh.

cc: James P. Corson,
West Publishing Company,
All Counsel
Encl.

Law Offices

LaBRUM and DOAK
1500 Seven Penn Center Plaza
Philadelphia, Pa. 19103

Telephone
215-561-4400

June 12, 1975

Re: In the matter of Goldchip Funding Co., etc: Ruth C. Lieb et al. v. 20th Century Corp. et al M.D. Pa. Civil Action No. 73-551

Mr. James P. Corson
West Publishing Company
St. Paul, Minnesota 55102

Dear Mr. Corson:

This will confirm our telephone conversation on Monday afternoon during which I advised you that we represent Messrs. Lyman and Ash and also requested that you defer decision as to whether or not to publish Judge Muir's opinion until the appeal has been decided.

We understood you to say that the galley proofs will not be returned to Judge Muir for comment and correction for at least two weeks and that the opinion would not normally be published until he returned the corrected proofs to you.

For the reasons stated in Mr. Lyman's letter to you dated May 31, 1975, and in my telephone conversation with you, we must insist that you comply with our request. The nature of this opinion is such that its publication and circulation throughout the United States by your company would be most damaging to our clients. We have requested Judge Muir to agree that the opinion not be published at least until after the appeal is decided. We must state to you, however, that if Judge Muir denies our request, we will hold your company fully accountable if you publish the opinion.

Very truly yours,

LaBRUM AND DOAK,
By ....,
James M. Marsh.

cc: Honorable Malcolm Muir
All Counsel

WEST PUBLISHING COMPANY
St. Paul, Minnesota 55102
Tel. 612/228-2500

June 5, 1975

Mr. Cletus P. Lyman
Attorney At Law
Lyman & Ash
1612 Latimer Street
Philadelphia, Pennsylvania 19103

Re: In the matter of Goldchip Funding Co., etc: Ruth C. Leib et al. v. 20th Century Corp. et al. M.D.Pa. Civil Action No. 73-551

Dear Mr. Lyman:

Your letter of May 31, 1975 addressed to Mr. Arnold O. Ginnow, the Editor-in-Chief, has been referred to my attention.

Under our standing arrangements with the Federal Judiciary we have agreed to defer completely to the determination of the United States District Judges as to which of their opinions should be published in Federal Supplement and Federal Rules Decisions.

Judge Muir has determined that the above opinion should be published and has forwarded it us accordingly. Thus, in accordance with our agreement with the Federal Judiciary, the opinion will be published in an early advance sheet.

With respect to your references to your appeal, I wish to assure you that the opinion of Judge Muir will be cross referenced to any decision of the Third Circuit forwarded to us for publication.

Very truly yours,

WEST PUBLISHING COMPANY.
James P. Corson,
James P. Corson,
Assistant Editorial Counsel.

JPC/sf

May 31, 1975

Mr. Arnold O. Ginnow
Editor in Chief
National Reporter System
West Publishing Company
50 Kellog Boulevard
Saint Paul, Minn. 55102

Re: In the matter of Goldchip Funding Co., etc: Ruth C. Leib et al. v. 20th Century Corp. et al. M.D. Pa. Civil Action No. 73-551

Dear Mr. Ginnow:

I write on behalf of myself and my partner, Richard A. Ash, Esq.

On March 28, 1975, the court entered an 81-page opinion and order in the above case, which dealt primarily with the amount our firm is entitled to be paid for representing a class of plaintiffs in a civil action. I believe that the court has sent this opinion and order to your firm for possible publication in one of the series of the National Reporter System (presumably the Federal Supplement or Federal Rules Decisions).

We request that the opinion not be published for the following reasons:

(1) The opinion contains derogatory statements about us, which are untrue and unsupported by the record;

(2) The opinion contains many statements about us involving private matters, which, even if they were true, should not be published. Many such statements are irrelevant to the issues before the court.

(3) The opinion and order are to be reviewed by the United States Court of Appeals for the Third Circuit by reason of our appeal from the order;

(4) The opinion, consisting almost exclusively of factual statements about us, is of little jurisprudential value.

(5) The opinion and order arose out of proceedings wherein we moved that the Court recuse itself for personal bias and prejudice against us, pursuant to 28 USC 144. The validity of our motion is one of the issues being appealed.

(6) Information in the opinion detailing income from the practice of law, our clients in other cases, and our fee relationship with other counsel was supplied to the Court by ourselves over our objections.

(7) The court deemed testimony by a partner in one of the law firms opposing us as to the hourly rate billed for attorneys in that firm to be of such a sensitive nature that he

stated he was willing to seal the portion of the record relating to it.

(8) The Court's findings of unethical conduct on our part were made without prior notice to us of the substance of these charges or providing us an opportunity to respond. Compare *Burhett v. Chandler*, 505 F.2d 217 (10th Cir. 1974); *Goss v. Lopez*, U.S. Supreme Court No. 73-898, 43 U.S.L.W. 4181 (decided January 22, 1975).

(9) In its order the court makes a referral to the Disciplinary Board of the Pennsylvania Supreme Court. The rules of the Pennsylvania Supreme Court provide that proceedings regarding alleged unethical conduct be kept confidential by persons involved until such proceedings are completed and the Supreme Court decides to make them public.

We would be happy to have further communications about this matter if you deem them likely helpful. We offer to make our copy of the record available to you for inspection and copying. We also offer to send you, without cost, copies of the appendix and our appellate brief, to be filed in the Third Circuit (expected to be available July 21, 1975).

Very truly yours,

CLETUS P. LYMAN.

CPL/j
AIR MAIL

APPENDIX I

Articles Printed in the daily press

IN OUR OPINION
THE QUALITY OF JUSTICE

A recurring theme in this space has been the unjust way this nation's justice system operates. Presided over by a select, highly-paid, largely self-regulating cadre of lawyers and judges, most usually ignored by the general public until an outrageous case spills over into the newspapers; distorted and manipulated by politicians of all stripes, the criminal justice system drags its paper-filled bureaucracy from idiocy to idiocy, inhumanity to inhumanity, a tradition-soaked monument to the imperfectability of man's institutions.

Herewith three recent cases:

After pleading no defense to 84 counts of Medicare fraud, Dr. Pablo K. Chan of Huntingdon Valley was sentenced to a mere 60 days in prison with the stipulation that he pay a $10,000 fine and complete three years of probationary medical service working with drug addicts. That was last September. A court later ordered that Chan serve his time by putting in 10 hours a day four days each week at Kensington Hospital. The other day a hospital administrator testified that Chan wasn't working those hours, that the hospital was paying him $20,000 a year and that the good doctor is also receiving more than $21,000 a year from treating Medicare patients at the hospital! Chan may serve a brief spell in

Dr. Jerome Friedman, an oral surgeon from the Northeast, was placed on three years' probation the other day. He also was fined $15,000. And ordered to repay Blue Shield $20,000 during his probationary period. The doctor's crime? Defrauding Blue Shield of $10,000 in payments for medical services he never performed. Add up the amount stolen and the amount of the fines and you come up with a neat $5,000 profit for the doctor. If he robbed a bank of $40,000 chances are he'd be shot down in the street. At the very least, he would spend some time in a cell.

Two Philadelphia lawyers, Cletus P. Lyman and Richard A. Ash, were accused by a Federal judge of attempted fraud in their request for $85,000 in legal fees. Judge Malcolm Muir called the attempt to charge such a fee "deplorable" (a favorite judicial description) and he reduced the fee the client had to pay the attorneys to $9,256. In an 83-page opinion the judge said the attorneys "attempted to perpetrate a fraud on this court." The judge also ordered that a copy of the charges be sent to the Disciplinary Board of the State Supreme Court. The board could recommend disbarment.

How many men and women are every day routinely consigned to those deadening warehouses we call prisons for offenses involving far lesser amounts of money? Folk singer Woody Guthrie said it perfectly years ago: "Some men rob you with a six-gun, some with a fountain pen."

To test our criminal justice system's fairness ask yourself these questions: How many poor people are in jails? How many rich ones? Are the poor people in jail a bigger menace to the rest of us than the rich criminals who are not in jail?

WE WERE WRONG

In yesterday's 4-star edition, an editorial said that Controller William Klenk "indicated flat out to a People Paper reporter that he was interested in smearing the mayor." Klenk did not say this but said he wanted to defeat Mayor Rizzo. The error was not the reporter's but the editorial writer's.

Philadelphia Daily News
April 3, 1975
Page 19

JUDGE ACCUSES 2 LAWYERS OF FEE FRAUD

Special to The Inquirer

SCRANTON—A federal judge's opinion, filed here Monday, accused two Philadelphia lawyers of attempting to defraud the court by inflating claims for counsel fees and expenses.

U. S. District Judge Malcoln Muir directed that a copy of his charges—which do not constitute a criminal indictment—be sent to the Disciplinary Board of the Supreme Court of Pennsylvania. The board has the power to recommend disbarment of the attorneys.

The lawyers, Richard A. Ash and Cletus P. Lyman, partners in a law firm of 1612 Latimer St., Philadelphia, said they would appeal the finding to the U. S. Court of Appeals for the 3d Circuit, Philadelphia.

In his opinion, Judge Muir said that "the books of account and time records of Lyman and Ash are untrustworthy and the testimony of Messrs. Lyman and Ash is not credible."

The judge's remarks were contained in an 80-page opinion that approved settlement of a class action suit to set aside the sale of Cosmopolitan Life Co. to 20th Century Fox because of defects in a proxy statement in connection with the sale. Lyman and Ash represented the Goldchip Funding Co., Cosmopolitan Investors Funding Co., Ruth T. Leib and Frank B. Leib, who brought the suit.

Lyman, speaking for himself and his partner, replied that "the time expanded in the case was conservatively stated to the court and all expenses petitioned for were incurred necessarily in prosecuting the case."

In a class action suit, it is normal procedure for the judge to determine how much of the settlement won by the plaintiff should be awarded to the attorneys for their work.

Judge Muir said Lyman and Ash applied to the court for $75,000 in counsel fees and $10,427 in reimbursements for expenses.

"But for the fraud attempted to be perpetrated on this court," Muir said, "Lyman and Ash would be entitled to reasonable attorney fees of $6,000. Because of such fraud, the amount of reasonable attorneys' fees to which Lyman and Ash are entitled is $3,000. Lyman and Ash are entitled to reimbursement of expenses of $6,256.72."

The judge said that after approving the settlement he held three days of hearings on the expenses and almost five more days on the application for counsel fees.

"Time entered on the time records of Lyman and Ash was intentionally inflated by Lyman," the judge said.

The Philadelphia Inquirer
April 1, 1975 Page B-1

U.S. JUDGE CUTS FEE OF 2 FROM PHILA.

Williamsport, Pa.—(AP)—A federal judge has accused two Philadelphia lawyers of attempted fraud in their request for $85,000 in legal fees.

U.S. District Court Judge Malcolm Muir charged that the fee set by attorneys Cletus P. Lyman and Richard A. Ash was "deplorable" and he reduced it to $9,256.

Lyman and Ash were attorneys for Goldchip Funding Co. in a federal civil suit earlier this year between Cosmopolitan Investors and Twentieth Century Corp.

The suit resulted in an award of $40,000 and 40,589 shares of Twentieth Century stock to Cosmopolitan. Stockholders of Goldchip, which owns shares in Cosmopolitan, asked Muir to review the attorneys' fee request.

In an 83-page opinion filed yesterday, Muir said Lyman and Ash "attempted to perpetrate a fraud on this court." He said documents filed by the lawyers were "among the worse I had ever seen."

Additionally, Muir directed that a copy of the charges be sent to the Disciplinary Board of the Supreme Court of Pennsylvania, which has the power to recommend disbarments of lawyers.

The Philadelphia Evening Bulletin
April 1, 1975 Page A-5

Appendix I—Articles Printed in the daily press.

BID FOR $85,000 LEGAL FEE BLASTED BY COURT

WILLIAMSPORT, PA. (AP)—A federal judge on Monday accused two Philadelphia attorneys of attempted fraud in their request for $85,000 in legal fees.

U.S. Dist. Court Judge Malcolm Muir said the fee set by attorneys Cletus P. Lyman and Richard A. Ash was "deplorable" and reduced it to $9,256.

Lyman is a native and former resident of Hazelton.

Lyman and Ash were attorneys for Goldchip Funding Co. in a federal civil suit earlier this year between Cosmopolitan Investors and Twentieth Century Corp. All three firms are based in the Camp Hill area.

The suit resulted in an award of $40,000 and 40,589 shares of Twentieth Century stock to Cosmopolitan. Stockholders of Goldchip, which owns shares in Cosmopolitan, asked Muir to review the attorney's fee request.

In an 83-page opinion, Muir said Lyman and Ash "attempted to perpetrate a fraud on this court." He said documents filed by the lawyers were "among the worse I had ever seen."

Hazleton Standard-Speaker
Tuesday, April 1, 1975
Page 28, Early Edition

APPENDIX J

List of Charges made by District Judge against Attorney Petitioners in Opinion of March 28, 1975

Page (Appendix K)

A133 "These petitioning attorneys are not only guilty of violations of the Code of Professional Responsibility with respect to their clients by their excessive claims (D.R. 2-106), but also have attempted to perpetrate a fraud on this Court by the filing of these false petitions."

A134 "The Court reduces the fee to $3,000 to reflect a penalty for their fraudulent conduct."

A136 "Claiming reimbursement under the five deceptive entries on the Schedule as as 'Dinners for staff (o.t.)' is a flagrant attempt to perpetrate a fraud on this Court and along with the fraudulent time entries involved a clear violation of Disciplinary Rule 1-102(a) of the Code of Professional Responsibility."

A139, 140 "There was a clear violation by Lyman and Ash of Disciplinary Rule 5-103(b) of the Code of Professional Responsibility which provides: ". . . a lawyer shall not advance or guarantee financial assistance to his client except that a lawyer may advance . . . the expenses of litigation . . . provided the client remains ultimately liable for such expenses . . ."

A141 "Lyman and Ash attempted to perpetrate a fraud on this Court in their claims for counsel fees and expenses."

A141 "Time entered on the time records of Lyman and Ash was intentionally inflated by Lyman."

Appendix J—List of Charges made by District Judge against Attorney Petitioners in Opinion of March 28, 1975.

Charges Made by District Judge

A141 "Lyman and Ash fraudulently claimed reimbursement in their petition for expenses for personal living expenses and intentionally camouflaged such items by designating them 'Dinners for Staff (o.t.)' in the petition for reimbursement."

A141 "Lyman and Ash violated their fiduciary duty to their clients in this case by attempting to secure a fee far in excess of that to which they were reasonably entitled, well knowing that the fee claimed was excessive."

A141 "Lyman and Ash violated their fiduciary duty to their clients by attempting to secure reimbursement for expenses for which they were not entitled to reimbursement, well knowing that they were not entitled to such reimbursement."

APPENDIX K

Opinion and Order of the United States District Court, Dated March 28, 1975

UNITED STATES DISTRICT COURT
For The Middle District of Pennsylvania

IN THE MATTER OF GOLDCHIP FUNDING COMPANY AND COSMOPOLITAN INVESTORS FUNDING COMPANY,

RUTH C. LEIB AND FRANK B. LEIB, et al.,
Plaintiffs,

vs.

20TH CENTURY CORPORATION, et al.,
Defendants.

CIVIL NO. 73-551
(Complaint Filed 9/27/73)
(Judge Muir)

APPEARANCES:

For Plaintiffs

Cletus P. Lyman, Esq., Richard A. Ash, Esq., Lyman and Ash, 1612 Latimer St., Philadelphia, Pa. 19103.

For Defendants

Rod J. Pera, Esq., W. Jeffrey Jamouneau, Esq., H. Lee Roussel, Esq., McNees, Wallace and Nurick, P. O. Box 1166, Harrisburg, Pa. 17108.

Perry S. Bechtle, Esq., Barry F. Greenberg, Esq., Cohen, Shapiro, Polisher, Shiekman, and Cohen, 12 South 12th St., Philadelphia, Pa. 19100.

Howard D. Scher, Esq., Goodis, Greenfield, Henry, Shaiman and Levin, 1315 Walnut St., Philadelphia, Pa. 19100.

UNITED STATES DISTRICT COURT
For The Middle District of Pennsylvania

IN THE MATTER OF GOLDCHIP FUNDING COMPANY AND COSMOPOLITAN INVESTORS FUNDING COMPANY

RUTH C. LEIB AND FRANK B. LEIB, et al.,
Plaintiffs,

vs.

20TH CENTURY CORPORATION, et al.,
Defendants.

CIVIL NO. 73-551
(Complaint Filed 9/27/73)
(Judge Muir)

OPINION

MUIR, District Judge.

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1. Introduction.

Before the Court is an application by the firm of Lyman and Ash for counsel fees of $75,000 plus expenses of $10,427.86, as well as small claims by four of the named Plaintiffs for travel expenses.

This stockholders' derivative suit was started September 27, 1973. It was converted into a class action on March 29, 1974. The case went to trial August 29, 1974 and on the 5th trial day counsel reported that a settlement had been agreed upon, subject to approval of the Court. After appropriate notice and a full hearing on November 18, 1974, the Court approved the settlement.

The Court set the attorneys' application for fees and expenses due for hearing. After three days of hearings on the expenses and after four and $^{3}/_{4}$ additional days of hearings on the application for counsel fees, the Court makes the following findings of fact.

2. Findings of Fact.

Biographical Data, Lyman.

1. Cletus P. Lyman is a member of the firm of Lyman and Ash, 1612 Latimer Street, Philadelphia, Pennsylvania, attorneys for Plaintiffs.

2. Lyman was graduated from law school in May of 1971.

3. Lyman was admitted to the bar of the Supreme Court of Pennsylvania on November 18, 1971.

4. Lyman was admitted to the bar of the United States District Court for the Eastern District of Pennsylvania in the spring of 1972.

5. Lyman was admitted to the bar of the Court of Appeals for the Third Circuit on August 1, 1972.

6. Lyman resides in the same building in which the law offices of Lyman and Ash are located, although his address is 1610 Latimer Street, slightly different from that of the law office.

7. Lyman is a member of the Luzerne County Bar Association only.

8. Lyman has no rating in Martindale-Hubbell. He has not been a member of the bar long enough to be eligible for a rating.

Biographical Data, Ash.

9. Richard A. Ash is the other member of the firm of Lyman and Ash.

10. Ash was admitted to the bar of the Pennsylvania Supreme Court early in 1965.

11. Ash was admitted to the bar of the Court of Appeals for the Third Circuit on August 1, 1972.

12. Ash resides at 18th and Parkway, Philadelphia, Pennsylvania, about ten blocks from the office of Lyman and Ash.

13. Ash is 48 years old.

14. Upon inquiry by the Court, Ash testified that he did not know his rating in Martindale-Hubbell. He then quickly changed his answer and admitted that he had during the noon hour looked at the court's copy of Martindale-Hubbell which had been brought into the courtroom during the morning session and which had been allowed to remain on the bar.

15. Ash has no rating in Martindale-Hubbell.

16. The highest rating which Ash could achieve in Martindale-Hubbell by reason of the fact that he had been admitted at the time of the hearing two months short of ten years is a "b" rating.

17. Ash's income from the practice of law for the years 1970 through 1973 is as follows:

Year	*Gross*	*Net*
1970	$1800.00	$448.00
1971	4647.00	2856.00
1972	33,645.00	16722.00
1973	5500.00	- 0 -

18. In 1969 Ash was employed by an association which was not a law firm and he preferred not to disclose to the court the amount of his salary for that year.

The Firm of Lyman and Ash.

19. The firm of Lyman and Ash was formed in November, 1972.

20. The firm of Lyman and Ash consists of two partners, Cletus P. Lyman and Richard A. Ash. The firm has had no salaried lawyer employees, no salaried secretaries, but has had in series three part-time employees paid on an hourly basis, at least two of whom were students.

21. Lyman and Ash are equal partners.

22. The firm of Lyman has no written partnership agreement.

23. Lyman and Ash filed partnership returns for the two-month period in 1972 and for the year 1973.

24. In 1973 the gross income of the firm of Lyman and Ash was approximately $11,000.00.

25. When Lyman and Ash have work for them, two secretaries from other law offices, Margie Turner and René Walton, typed for Lyman and Ash after 5:00 P.M. and on weekends between 9:00 A.M. and 5:00 P.M.

26. Ash testified that the office overhead for 1973 was made up as follows:

Rent	$3075.00
Office expense	447.00
Duplicating Expense	866.00
Telephone	2282.00
Bank Charges	87.00
Travel	361.00
Entertainment	30.00
Mailing	59.00
Maintenance	157.00
Miscellaneous Services Expense	110.00
Typing	2094.00
Miscellaneous	141.00
Total	$9709.00

27. The firm of Lyman and Ash reported to the I.R.S. no distributable income for the individual partners for the year 1973.

28. The library of Lyman and Ash consists of the following:

Rule 23 volume from U.S.C.A. relating to class actions
Federal Rules of Civil Procedure
Value Line on Securities
Stock Exchange Guide to Listed Companies
Security Dealers' Guide
Miscellaneous other volumes which Ash did not recall.

29. Almost all of Lyman and Ash's practice is in federal courts.

30. The firm of Lyman and Ash is not in any law list of preeminent counsel.

The Applications for Fees.

31. At the time this case was filed, Lyman and Ash agreed with the named Plaintiffs that they would look to the Court for an award of fees and would not look to the named Plaintiffs for compensation.

32. In ¶ 5 of the affidavit attached to the Petition of Plaintiffs' counsel for award of counsel fees, Ash asserted that he had spent 599.8 identifiable hours in prosecuting this action from September 15, 1973 to November 14, 1974.

33. In ¶ 6 of an affidavit attached to the Petition of Plaintiffs' counsel for award of counsel fees, Lyman asserted that he had spent 674.4 identifiable hours in prosecuting this action from September 15, 1973 to November 14, 1974.

34. In ¶ 9 of the same affidavit, Ash claims 749.75 hours and Lyman claims 843 hours spent in prosecuting this litigation, being 125% of Ash's 598.8 and Lyman's 674.4 so-called identifiable hours.

35. The explanation for this arbitrary increase is contained in ¶ 7 of the affidavit attached to the petition which reads as follows:

> "The total identifiable hours is less than the total of hours spent in prosecuting litigation, because hours spent rendering services of the following nature are not identifiable: brief discussions between ourselves; *the writing of routine correspondence;* the reading of incoming correspondence, pleadings, motion papers, briefs and opinions; the routine incoming and outgoing telephone calls; delays in making train and airplane connections; *and non working hours necessarily expended in overnight trips.*" (emphasis added.)

36. All counsel acknowledged that counsel for Plaintiffs were advised from the bench when the action was converted into a class action early in 1974 that any application for counsel fees must be supported by documentation showing the dates on which the services were rendered, the particular services rendered on each date, the amount of time expended, the name of the lawyer rendering the services and the hourly billing rate of such lawyer. This was confirmed by letter of the undersigned judge to Lyman on August 7, 1974 when his

application for counsel fees and expenses in connection with compelling answers to interrogatories was denied (Defendants' Exh. 516).

37. The time entries set forth in schedule B attached to the petition for counsel fees which relate to the period before June 23, 1974 were reconstructed by Lyman from memory as refreshed by an examination of the file.

38. Schedule B attached to the petition for counsel fees purports to show that Lyman spent the following time in preparation of the petition for expenses:

September 28, 1974	1.0 hours
November 11, 1974	5.0 hours
November 12, 1974	4.0 hours

39. Lyman testified that he spent 17.5 hours working on the petition for fees.

40. Schedule B, p. 6, attached to the petition for counsel fees purports to show that Lyman spent the following time in preparation of the petition for counsel fees:

November 14, 1974	10.5 hours

41. Lyman and Ash arrived at the $75,000 fee requested in this case after consideration of the time allegedly spent by them, plus a quarter thereof, multiplied by $50.00 per hour. This would equal $79,637.50.

42. Disregarding the 25% arbitrary mark-up in time, Lyman claims to have spent 674.4 hours on this case and Ash claims to have spent 599.8 hours on this case. At the rates set forth in the petition, $50.00 per hour for Lyman and $60.00 per hour for Ash, if the hours were actually spent, and disregarding all other factors, there would result a total fee of $69,708.

43. Lyman testified that part of the $75,000 fee claimed is attributable to figuring out the fee.

44. In determining the fee to be requested in this case, Lyman and Ash took into account their own tax considerations, inter alia, because they thought they might have to accept property and cash in payment of the fee.

The Application for Expenses.

45. On November 18, 1974, the date of the hearing on the settlement in the above-captioned action, Lyman and Ash delivered to the Court, but did not file, a petition for award of "identifiable expenses" as counsel for Plaintiffs (Plaintiffs' exhibit 601). A cursory examination that day of the schedule of "identifiable expenses" by the Court on the bench indicated that the schedule was completely lacking in the necessary detail and included many items labelled "typing".

46. The total for typing in the schedule of "identifiable expenses", Plaintiffs' Exhibit 601, was $1245.68.

47. The Court rejected the petition for identifiable expenses from the bench on November 18, 1974 because the petition included items which were obviously not expenses for which Plaintiffs' counsel were entitled to reimbursement and because of lack of proper detail.

48. On December 3, 1974, Plaintiffs' counsel filed a revised petition for award of "identifiable expenses" totalling

$10,887.92. The affidavit attached thereto in ¶ 4 claims an expenditure of $10,826.91, less reimbursement received of $499.05, leaving a balance of $10,427.86 (sic) which was designated by Plaintiffs' counsel as "total expenses to November 29, 1974, less reimbursement".

49. Although Plaintiffs' counsel had originally claimed reimbursement for typing expenses in the amount of $1245.68 on the Plaintiffs' exhibit 601, they withdrew the same and did not include it in the petition filed December 3, 1974 because the Court had indicated from the bench on November 18, 1974 that it considered the charge improper.

50. Attached to the petition of Plaintiffs' counsel for award of identifiable expenses is a Schedule A purporting to list such expenses.

51. Of the expenses listed by Lyman and Ash, approximately $2,000.00 have not as yet been paid.

52. All expenses other than $500.00 which have been paid and are listed by Lyman and Ash have been advanced by that law firm. Lyman concluded in September, 1973, that he would petition the court for reimbursement of expenses.

Books of Account.

53. No financial ledgers, journals, or other books of account were kept by Lyman and Ash from the formation of the firm in November, 1972 to June, 1974.

54. The only financial record kept in the office of Lyman and Ash during the period from November 1972 to June, 1974 was the checkbook and that was never balanced during the 20-month period.

55. In June, 1974, Donald W. Rome, a part-time bookkeeper and student, reconciled the checkbook balance with the bank statements from November, 1972 through May, 1974.

56. The bookkeeping system installed by Rome was kept in pencil and the bookkeeper admitted making erasures and changes therein.

57. During June, 1974, Rome brought the cash disbursements journal of the firm up to date from November, 1972.

58. Prior to June, 1974, no time or cash ledger sheets were kept by the firm of Lyman and Ash or either of the partners with respect to this case. In June, 1974, Rome posted to the Leib ledger from the inception of the case, claims to have brought the ledger current and to have maintained it current since that date, except as to telephone charges.

59. Allocations were sometimes made by Rome to this case on the advice of Lyman or Ash where no check stub data or other written memoranda supported the allocations.

60. The posting to the cash ledger of telephone calls in the firm of Lyman and Ash is made from the monthly telephone bills and not from the cash disbursements journal.

61. Lyman and Ash kept no records of out of pocket expenses on a daily or other basis and the out-of-pocket expenses listed in their petition were based on recollection of Lyman and Ash, some receipts from sellers of goods and services and some memos kept by Lyman and Ash.

62. It was the custom of Lyman and Ash to destroy the original customer's copy of invoices received from sellers of goods and services on the date of the sale.

63. Some of the memoranda relied upon by Lyman and Ash were received from Carte Blanche as much as five months after the expenses were incurred. Such items were listed on the schedule attached to the petition chronologically by date paid and no reference was made therein to the date the expense was incurred.

64. Statements received by Lyman and Ash from Carte Blanche covered expenses charged to this case, expenses charged to other cases, and personal expenses of Lyman.

65. The payments to Dorian, a former part-time employee, were under office practice detailed on checkstubs of checks payable to him.

66. Checks are now claimed to be posted in the firm of Lyman and Ash to a general journal about one month after the checks are entered in the checkbook stubs.

67. The code symbol used by Lyman and Ash on checkstubs and other documents to indicate an allocation to this case is "LeT".

Dinners for Staff (O.T.)

68. Reimbursement is claimed by Lyman and Ash for "Dinners for Staff (O.T.)" as follows:

December 11, 1973 R. Ash/Dinner for Staff (O.T.)/Reimbursement	5.37
July 1, 1974 Cash/Dinners for Staff (O.T.)	52.50
July 4, 1974 Lickety Split/Dinners for Staff (O.T.)	34.10
July 22, 1974 Happy Rooster/Dinners for Staff (O.T.)	16.50
August 26, 1974 The Garden/Dinners for Staff (O.T.)	25.00
August 27, 1974 Frog Restaurant/Dinners for Staff (O.T.)	22.00
August 30, 1974 Cobblestones Restaurant/Dinners for Staff (O.T.)	23.00
	$178.47

69. The designation (O.T.) indicates overtime.

70. The firm of Lyman and Ash had no secretary on duty between the hours of 9:00 A.M. and 5:00 P.M. on Mondays through Friday.

71. Lyman and Ash engaged several secretaries from other law firms who typed after 5:00 P.M. on Mondays through Fridays, and as occasion arose, over the weekends, and on holidays.

72. The July 1, 1974 payment of $52.50 to the Drake Hotel in Philadelphia covered items furnished Lyman and Ash individually, Rome the bookkeeper, and Margie Turner, a typist who worked into the late hours that night.

73. The July 4, 1974 payment of $34.10 to the Lickety Split Restaurant, a fashionable restaurant 14 blocks from the of-

fice of Lyman and Ash, relates to dinners for Lyman and Ash and a typist, Rene Walton.

74. The July 22, 1974 payment of $16.50 to the Happy Rooster Restaurant in Philadelphia was for food or beverages or both furnished Lyman and Margie Turner who were working late that evening.

75. The August 26, 1974 payment of $25.00 to the Garden Restaurant in Philadelphia was for a dinner attended only by Lyman and Ash at which a planning session was held.

76. The August 27, 1974 payment of $22.00 to Frogs Restaurant in Philadelphia covered a dinner attended only by Lyman and Ash shortly before the trial at which they planned trial strategy.

77. The August 30, 1974 payment of $23.00 to Cobblestones Restaurant in Philadelphia covers meals for Lyman and Ash only. The Cobblestones Restaurant is within 11 blocks of the office of Lyman and Ash. The dinner was late at night on a day of the trial in Lewisburg when Lyman and Ash had returned to Philadelphia, although the date on the check is one day later. (Defendants' Exhibit 509(2)).

78. A check dated August 25, 1974 in the amount of $18.50 payable to the Garden Restaurant in Philadelphia covered lunch for certain persons, the recipients being unknown. This item is shown as "The Garden/Lunch with Clients 18.50" on the claim for reimbursement and is in addition to the $178.47 for "Dinners for Staff (O.T.)".

79. Of the so-called "Dinners for Staff (O.T.)", six of the charges cover either Lyman or Ash or both of them. Three of

these so-called "Dinners for Staff (O.T.)" entries relate to dinners where on Lyman and Ash were present and all of the "Dinners for Staff (O.T.)" were in Philadelphia.

Photocopying.

80. On December 10, 1973, $3.60 was charged to this case to cover payment to the Jenkins Law Library in Philadelphia, Pennsylvania for copying a court opinion for Ash.

81. On December 11, 1973, Ash was reimbursed for out-of-pocket expenses by check No. 337 in the amount of $4.50 to cover copying of a court opinion for him at the Jenkins Law Library.

82. Many, if not all, of the items occurring on and after December 21, 1973 for reimbursement for legal research copying relate to photocopying of court opinions at the Jenkins Law Library in Philadelphia for Lyman and Ash.

83. On April 16, 1974, an expense was incurred to J. Sadden for clerical services, copying of documents, at McNees, Wallace and Nurick Harrisburg, in the amount of $25.00. These copies were handed up to the court at the trial, were each a photocopy of a third of a large original sheet, were not pieced together, and were completely unintelligible to the Court.

84. The item shown on Schedule A, page 7 attached to the petition for reimbursement designated "Cumberland County Bank/Witness fee/Deposition including copying expenses $67.00" is incorrect and the deposition was never taken.

85. The amount of $67.00 payable to Cumberland County Bank is actually arrived at as follows:

Photostats	$ 98.00
Four trips to Lemoyne	4.00
Total	$102.00
Credit	35.00
Total	$ 67.00

86. On Schedule A, page 8, attached to the petition for expenses is this item:

September 15, 1973 through
November 29, 1974

In addition to copying reflected above, purchased from commercial copy services, it is estimated that Lyman & Ash made no less than 3,000 copies on its in-office copy machine. These copies have a cost of approximately 5¢ each. 150.00

87. The $150.00 item just mentioned is an estimate made by Lyman based upon documents in the file and his further estimate that two copies of each document were sent to other counsel.

88. The estimate with respect to numbers of in-office copies was made by Lyman from a hurried perusal of the files.

89. From the inception of the firm in November, 1972 to the date of the hearing on the application for expenses no log or other system was kept by Lyman and Ash for entry of charges for photocopying in the office.

Paralegal Services.

90. Lyman and Ash claim reimbursement for expenses for paralegal services in the amount of $781.05.

91. The claim for expenses for paralegal personnel in the amount of $781.05 covers Max Dorian, a $5.00 per hour, Nicholas Cobb at the same rate and Donald W. Rome at $3.00 per hour.

92. M. Dorian was at the time of the services rendered a graduate of the University of Pennsylvania Law School, not yet admitted to the bar and is now employed by the Federal Trade Commission.

93. M. Dorian's bill for $109.95, Defendants' Exhibit 502, paid August 2, 1974, may have a covered services for Lyman and Ash in connection with other cases but Lyman claims to have no recollection that Dorian worked on any other case.

94. One of the items relating to the paralegal charge refers to N. Cobbs, a third year law student, for legal research, travel, and out-of-pocket expenses, April 8, 1974. Lyman and Ash had no breakdown of this expense and although they claimed they thought they had a statement showing a breakdown, none was produced at the hearing.

95. Donald W. Rome entered the employ of Lyman and Ash on May 15, 1974. He is now a third year student at Wharton School majoring in accounting. He serves Lyman and Ash as a part-time bookkeeper and filing clerk.

96. Rome attended some law classes at the University of Pennsylvania during the last scholastic year.

97. Part of the paralegal expenses for which reimbursement is claimed is $100.00 paid D. Rome. His services consisted in driving Plaintiffs' counsel from Philadelphia to Lewisburg for the trial, in gathering papers shortly before the trial to transport to Lewisburg and some incidental services with the files at the trial.

98. Rome developed the dates and amounts and payees shown on the Plaintiffs' statement of "identifiable expenses."

Telephone Charges.

99. The application for reimbursable expenses lodged with the Court on November 18, 1974 but not filed shows long-distance telephone toll charges of $802.06 while the schedule attached to the petition filed December 3, 1974 for reimbursement of expenses shows $847.99 in the same category.

100. From the inception of the firm in November, 1972, to the date of the hearing on the application for expenses, no daily, weekly, or monthly log or other system was kept in the office of Lyman and Ash for entry of long-distance telephone charges.

101. It was the practice of Lyman to examine the long-distance telephone bills sometimes months after they were received and then allocate the charges to various clients.

102. Lyman claimed that since either June or July, 1974, telephone bills have been examined monthly by Lyman and have been allocated by him among the various cases in the office.

103. Lyman testified that in August, 1974, he allocated all the telephone bills received from September 15, 1973, the approximate date of the start of this action, to August, 1974.

104. Lyman testified that after August, 1974, the allocation was made by him on the days of the telephone bills were received.

105. As late as August 7, 1974, Lyman advised J.B. Albert, counsel for Cosmopolitan Investors Funding Company, that he had no breakdown of telephone expenses incurred in this action.

106. Telephone charges were never posted to a ledger or other record for this case until November, 1974.

107. Included in the claim for reimbursement for long distance telephone calls is an item of $116.96 labelled "surcharge and taxes (16% of above)". This was an approximation by Lyman.

Travel.

108. A June 24, 1974 Carte Blanche Voucher for $23.50 reflected transportation by the Penn Central from Philadelphia to Washington, D.C., probably for Lyman and a Mr. Dorian (Plaintiffs' Exh. 618.3).

109. Another Carte Blanche Voucher of June 24, 1974 for $23.50 was for Amtrak transportation from Washington, D.C. to Philadelphia for Lyman and Mr. Dorian (Plaintiffs' Exhibit 618.4).

110. Lyman testified that the Carte Blanche voucher to Hertz for June 28 and June 29, 1974 in the amount of $55.20

was incurred in connection with the pre-trial conference in this case in Lewisburg, Pennsylvania (Plaintiffs' Exhibit 618.5). The dates, amounts, and "Hertz 1880" may have been inserted on Plaintiffs' Exhibit 618.5 after its issuance. There is nothing shown on the photocopy of the voucher submitted to the court to indicate a signature, date of issue, amount or matter.

111. On July 21, 1974, three or four checks from Lyman and Ash and from Lyman covering two monthly bills were mailed to Carte Blanche and $18.23 was allocated to this case. The item shown on the petition for expenses under date of July 21, 1974 as "Carte Blanche/travel/trip to Harrisburg $18.23" actually relates to an Amtrak ticket on February 27, 1974 in the amount of $4.50 and a rental car expense of $13.73, date uncertain. The rent-a-car voucher was marked Leib when the voucher was signed and the Amtrak item was marked LeT.

112. The Carte Blanche bill of August 6, 1974 submitted to Lyman was $273.98 (Plaintiffs' Exhibit 618.1).

113. The Carte Blanche bill of September 5, 1974 for $394.68 is made up of current charges $120.70 and past charges $273.98 (Plaintiffs' Exhibit 618.2).

114. Included in the claim for reimbursement, Schedule A, page 6, is an item dated September 28, 1974, as follows: "Carte Blanche/Travel/Misc. Travel by C. Lyman reflected in August and September statements, $112.70." $102.20 of this $112.70 is made up of

> $23.50, travel, date and destination unknown, probably to Washington

> $55.20, presumably air fare to Williamsport airport in connection with pre-trial conference of July 29, 1974,
>
> $23.50 to travel: fare to Washington, probably in June or July, 1974.

115. A requisition by Lyman to the bookkeeper dated September 28, 1974 directed that payment be made to Carte Blanche relating to the latter's statements for August and September, 1974, and that $102.20 be charged to this case. Three of the four items making up the $112.70 related to this case and one related to a case designated by the code AmT for $10.50. The $10.50 item referring to case coded AmT was erroneously charged to the Leib case in the petition for refund of expenses and had erroneously been charged to the Leib account by the bookkeeper. The requisition bears the notation "these items derived from my August and September statements total $112.70. Cletus."

116. On September 28, 1974 checks of Lyman and Ash and one check of Lyman personally were sent to Carte Blanche.

117. Cletus P. Lyman paid Carte Blanche $249.34 by his check on September 28, 1974 (Plaintiffs' Exhibit 618.6).

118. On November 3, 1974, Lyman gave a handwritten requisition to the bookkeeper directing payment to Master Charge of $68.16 to be charged to this case. Schedule A, page 6, attached to the petition for reimbursement shows "November 4 Master Charge/Travel/Misc. Travel by C. Lyman reflected on September statement, $68.16."

119. Although the requisition mentioned in the last paragraph indicates three items to be charged to this case in

the amounts of $21.24, $28.64 and $18.28 totalling $68.16, Lyman does not know what these were for and presented to the Court no supporting data with respect to the same.

120. The Master Charge statements paid November 4, 1974 had no original invoices attached and none were sent with the Master Charge bill. The print-out on the statement shows merely the place, date and amount of the charge.

121. The amount of the Master Charge payment made November 4, 1974 exceeded $138.68 which was allocated by Lyman to this and two other cases, the balance of the charges relating to some of Lyman's personal expenses.

122. Lyman and Ash made eight trips each from Philadelphia to Williamsport and Lewisburg.

123. Lyman and Ash estimated that they had spent 100 hours travel time overall in this case for both counsel from Philadelphia to Lewisburg and Williamsport and 40 hours travel from Philadelphia to Harrisburg.

124. The portion of the Master Charge bill of October 10, 1974 retained by Lyman and Ash shows print-out reference numbers, dates, description and amounts and bears handwritten notations by Lyman of LeT, AmT and Raa, including one LeT notation crossed out (Plaintiffs' Exhibit 618.7).

Printing.

125. Plaintiffs' counsel requested reimbursement for printing expenses in the amount of $734.42.

126. One of the items in the claim for printing expenses relates to $50.00 owed Alina Radziejowska for preparing a graphic design of notice to the shareholders sent out about June 15, 1974.

Time Records.

127. Ash's pre-June 23, 1974 time in this case was determined by him by a study of the underlying documents in this case on November 14, 1974.

128. Early in the conduct of this litigation, the Court advised counsel from the bench that if an application were to be made to the Court for counsel fees, such application must be supported by a statement showing the date each service was rendered, the name of the person rendering the service, an itemization of the service on the particular date, the amount of time used in rendering the service on the particular date, the regular hourly billing rate of the lawyer rendering the service, and such other data as might be appropriate.

129. Despite the holding of Lindy Brothers Builders, Inc. vs. American Radiator, 487 F.2d 161 (3d Cir. 1973), and despite the admonition by the Court early in this case, no concurrent time records whatsoever were kept by Lyman or Ash until the week of June 23, 1974.

130. Ash's first time record was made for the week ending June 30.

131. Ash recreated the time entries for an entire week sometime at the end of a week.

132. The time sheets of Lyman and Ash purport to show, since June 23, 1974, total hours and fractions thereof spent on a given day for a particular client, but do not show the times during the day when the services were rendered.

133. In connection with a motion for continuance in this case Lyman claims to have expended on July 17, 1974 on research 1.5 hours which are not shown on his time sheets. The time sheets for that day show:

Review of file, mis. tel. calls	8.0 hours
Motion for continuance	3.0 hours
[Total	11.0 hours]

Schedule B, page 4 for that date shows

Motion to take LKHH deposition late	2.5 hours
Research re continuance	1.5 hours
Misc. tel. calls	0.5 hours
Review of entire file	8.0 hours
	12.5 hours

134. On July 20, 1974, Lyman's time sheets show 6.0 hours in telephone calls to witnesses, preparation of documents and research re continuance.

135. On July 21, 1974 Ash's schedule A, page 3 entry for July 21, indicates three hours in preparation of motion for continuance.

136. Lyman testified that on July 28, 1974, he spent an additional 4.5 hours on the pre-trial documents including affidavit re continuance.

137. The motion for continuance was denied.

138. On August 5, 1974, three letters were written to the undersigned judge, one of one sentence, one of two sentences, and one of six sentences. Defendants' Exhibit 519.1-.3.. A

fourth letter was written to the witness Conn concerning an appraisal. Plaintiffs' Exhibit 624. The amount of time allocated to this correspondence by Lyman was two hours. Copies are attached to these findings.

139. On August 13, 1974, Lyman dictated five letters and at that time made an entry of two hours in his time sheets attributable thereto. Four of these are of extreme brevity, the fifth was of modest length. Defendants' Exhibits 518.1-.5. Copies are attached to these findings.

140. The petition for counsel fees shows in Schedule A, pages 4 and 5, services by Ash on November 12 totalling .5 hours and November 14 totalling 7.3 hours, none of which were shown on Ash's time sheets.

141. The time sheets of Lyman and Ash do not show any billing rate nor do they show any amount in dollars from which a billing rate could be derived.

142. Ash's time record for the week July 7, 1974 is missing.

143. Ash had two July 12 time reports, one showing two hours and one showing eight hours allocated to this case and he disregarded the eight-hour record.

144. Ash's time records had omissions which were supplied by Lyman's records and vice versa.

145. Ash testified that as a rule of thumb if there were any uncertainty as to the amount of time spent in connection with a particular item in this case he used an amount of time which favored the client.

146. Those time items appearing on Schedule B relating to preparation of the petition for counsel fees are based solely upon Lyman's memory, although they are post-June, 1974 entries.

147. The amount of time entered in their daily or weekly time records by Lyman and Ash and charged to this case greatly exceeded in certain instances the actual time involved.

147.3 Of the 674.4 hours claimed to have been spent by Lyman, 231.5 hours, or 34.3% pre-date Lyman's true records.

147.6 Of the 599.8 hours claimed to have been spent by Ash, 201.5 hours or 33.6% pre-date Ash's true records.

Law Offices of

LYMAN & ASH
1612 Latimer Street
Philadelphia 19103
732-7040 Area Code 215

Cletus P. Lyman

August 5, 1974

Mr. Michael Conn
The Pennsylvania Group
2 Decker Square
Bala Cynwyd, Pa. 19004

Re: Leib v. 20th Century

Dear Michael:

I am forwarding herewith the following documents in connection with your evaluation of 20th Century Corporation:

1. The complete report of Consumers Life to the Delaware Insurance Commissioner (1973).

2. A copy of the notes of testimony of Philip Turberg, Huggins & Co.

3. Copies of documents produced by Huggins & Co. referred to in the Turberg testimony.

Very truly yours,

CLETUS,
Cletus P. Lyman.

CPL/mm
enc.

Please preserve unmarked for use as evidence.

Law Offices of

LYMAN & ASH
1612 Latimer Street
Philadelphia 19103
732-7040 Area Code 215

Cletus P. Lyman

August 5, 1974

Hon. Malcolm Muir
U. S. District Court House
Lewisburg, Pennsylvania

Re: Leib v. 20th Century Corporation
C. A. 73-551

Dear Judge Muir:

Kindly know that plaintiffs have no objection to the motion of Perry Bechtle, Esq. that his firm withdraw as counsel for Goldchip Funding Company.

Respectfully yours,

CLETUS P. LYMAN,
Cletus P. Lyman.

CPL/mt
cc: All counsel

Law Offices of

LYMAN & ASH
1612 Latimer Street
Philadelphia 19103
732-7040 Area Code 215

Cletus P. Lyman

August 5, 1974

Hon. Malcolm Muir
United States District Court
Lewisburg, Pa. 17837

Re: Leib v. 20th Century
Civ. Act. 73-551

Dear Judge Muir:

Kindly find enclosed plaintiffs' motion for award of reasonable expenses incurred in opposing motion to compel answers to interrogatories and the original and two copies of a memorandum in support thereof.

Copies of these documents are being served today by mail on all counsel.

Respectfully yours,

CLETUS P. LYMAN.

CPL/mm
enc.
cc:
ALL COUNSEL

Law Offices of

LYMAN & ASH
1612 Latimer Street
Philadelphia 19103
732-7040 Area Code 215

Cletus P. Lyman

August 5, 1974

Hon. Malcolm Muir
United States District Court House
Lewisburg, Pennsylvania 17827

Re: Leib v. 20th Century Corporation
C. A. 73-551

Dear Judge Muir:

We received copy of a letter of August 2, 1974 from W. Jeffry Jamouneau, Esq., to Your Honor.

Without concurring in the precise language used by Mr. Jamouneau in characterizing issues in the case, plaintiffs agree with the division of issues as set forth by Mr. Jamouneau. As Mr. Jamouneau points out, issues 2 and 3 are not being settled. We understand that Your Honor is willing to continue trial of issue 1 on account of the pending settlement proceedings but that Your Honor is unwilling to continue trial of issues not being settled. We understand that the only question for comment, therefore, is whether issues 2 and 3 should be tried in one trial or seriatim in two trials. Plaintiffs concur with Mr. Jamouneau in his view that issues 2 and 3 should be tried together.

Respectfully yours,

CLETUS P. LYMAN.

CPL/mt
cc: W. Jeffry Jamouneau, Esq.
Jeffrey B. Albert, Esq.
Perry S. Bechtle, Esq.

Law Offices of

LYMAN & ASH
1612 Latimer Street
Philadelphia 19103
732-7040 Area Code 215

Cletus P. Lyman

August 13, 1974

Jeffrey B. Albert, Esquire
1315 Walnut Street
Philadelphia, Pennsylvania 19107

Re: Leib et al. v. 20th Century
Corp. et al.

Dear Jeffrey:

I hereby request that the following directors of Cosmopolitan Funding make themselves available to testify at trial on behalf of plaintiffs: Steven Jacobs, Bennett Lyons and John D'Ginto.

Very truly yours,

CLETUS P. LYMAN.

rlw

Law Offices of

LYMAN & ASH
1612 Latimer Street
Philadelphia 19103
732-7040 Area Code 215

Cletus P. Lyman

August 13, 1974

Perry S. Bechtle, Esquire
22nd Fl., Philadelphia Saving Fund Bldg.
Philadelphia, Pennsylvania 19107

Re: Leib et al. v. 20th Century Corp. et al.

Dear Perry:

This will confirm our understanding that your individual clients will all make themselves available to testify on behalf of plaintiffs at trial without the necessity of serving subpoenas.

Very truly yours,

CLETUS P. LYMAN.

rlw

cc: Barry F. Greenberg, Esquire

Law Offices of

LYMAN & ASH
1612 Latimer Street
Philadelphia 19103
732-7040 Area Code 215

Cletus P. Lyman

August 13, 1974

Barry F. Greenberg, Esquire
22nd Fl., PSFS Building
Philadelphia, PA 19107

Jeffrey B. Albert, Esquire
1315 Walnut Street
Philadelphia, PA 19107

Re: *Leib, et al. v. 20th Century Corp., et al.*

Gentlemen:

This will confirm our schedule of conferences to close the partial compromise in the above matter.

We shall meet at Barry's office at 3:30 P.M. on Thursday, August 15, 1974, to agree on a final draft of settlement papers.

We shall meet at our offices at 10:30 A.M., Monday, August 19, for signing of the documents for tender of payment to the escrow (Jeffrey) and for any other transactions in connection with closing. This meeting will be attended by persons authorized to sign on behalf of all parties to the compromise.

You will recall that documents have to be filed with Judge Muir by 9:00 A.M., Tuesday, August 20, 1974.

Very truly yours,

CLETUS,
Cletus P. Lyman.

rlw

Law Offices of

LYMAN & ASH
1612 Latimer Street
Philadelphia 19103
732-7040 Area Code 215

Cletus P. Lyman

August 13, 1974

W. Jeffry Jamouneau, Esquire
McNees, Wallace and Nurick
100 Pine Street
Harrisburg, Pennsylvania 17108

Re: *Leib, et al. v. 20th Century Corp., et al.*

Dear Jeffry:

This will confirm our understanding that your client will make the following officers available to testify on behalf of plaintiffs at trial without the necessity of service of subpoenas: James C. Robertson, John S. Shillingsford and Samuel Rosenberger.

Very truly yours,

CLETUS P. LYMAN.

rlw

Law Offices of

LYMAN & ASH
1612 Latimer Street
Philadelphia 19103
732-7040 Area Code 215

Cletus P. Lyman

August 13, 1974

W. Jeffry Jamouneau, Esquire
100 Pine Street
Harrisburg, PA 17108

Barry F. Greenberg, Esquire
22nd Fl., PSFS Building
Philadelphia, PA 19107

Jeffrey B. Albert, Esquire
1315 Walnut Street
Philadelphia, PA 19107

Re: *Leib, et al. v. 20th Century Corp., et al.*

Gentlemen:

I propose that we have a further pretrial meeting of counsel to review uncontested facts and contested issues. I invite you to meet at our offices on Tuesday, August 20, 1974, at 10:30 A.M.

Very truly yours,

CLETUS,
Cletus P. Lyman.

rlw

Correspondence.

148. The file of Lyman and Ash indicates that there were 211 outgoing letters in this case through November 14, 1974.

149. Lyman typed Exhibit 519.2.

150. Lyman testified that he typed 5% of the letters in this case.

151. There was no testimony that there is a practice in the Lyman and Ash firm relating to a minimum fee or minimum time charge for a letter.

Expenses of Parties.

152. The Plaintiff Ruth C. Leib advanced $500.00 towards the costs of this litigation at the start thereof.

153. Plaintiff Frank Leib made several trips from Philadelphia to Hazleton and some long distance telephone calls in connection with this case, the dates and amounts involved being unknown.

154. The charge for a bus trip from Hazleton to Philadelphia is about $11.00.

155. Plaintiff Frank Leib estimated that his transportation charges allocable to this case were between $15.00 and $20.00.

156. Plaintiff Frank Leib received from Lyman and Ash a list of the expenditures in this case about November 25, 1974.

157. When Plaintiffs' Exhibit 601 listing the purported expenses was exhibited to the Plaintiff Frank Leib, he asked no questions about it. Plaintiffs' Exhibit 601 is the draft of identifiable expenses presented to the Court but not intended to be filed.

158. Plaintiff Frank Leib never examined the journal or ledger of Lyman and Ash.

159. Neither Lyman nor Ash ever discussed specific expenses with the Plaintiffs before such expenses were incurred, and Plaintiffs never agreed to be liable for the expenses of this suit incurred or to be incurred.

160. Plaintiff Ruth C. Leib made six trips from her residence in Hazleton to Philadelphia, 180 miles circular, and between six and eight trips to Lewisburg, 150 miles circular, being a total mileage of 2280 miles. She claims reimbursement at the rate of $.12 per mile or a total of $273.60.

161. Plaintiff Ruth C. Leib has no record of the meals purchased in connection with this case and testified that their cost was $300.00 at a minimum.

162. The Plaintiff Ruth C. Leib paid $40.00 for motel accommodations during the first week of the hearing on counsel fees and expenses.

163. The Plaintiff Ruth C. Leib claims a total of reimbursable expenses in the amount of $400.00.

164. The other two named Plaintiffs, Andrew Yenchko and Mary K. Yenchko, his wife, incurred travel expenses necessary to this action in the amount of $45.00 (stipulation in open court).

Cosmopolitan Investors, Assets & Liabilities.

165. The current assets of Cosmopolitan Investors Funding Co., Inc. are as follows:

Cash	$1,022.00
Accounts Receivable	3,012.00
Prepaid Taxes	244.00
	$4,278.00

166. The current Cosmopolitan Investors Funding Co., Inc. liabilities are:

Accounts Payable	$36,816.00
Accrued Taxes	7,834.00
	$44,650.00

167. Cosmopolitan Investors Funding Co., Inc., according to the testimony of its Vice President, Finance, has made an investment of $2,112,870.00 in 20th Century Corporation represented by common stock received in 1973 in two transactions: 223,118 shares of 20th Century common stock in the first transaction and 260,980 shares in the second transaction.

168. Cosmopolitan Investors Funding Company has no current income.

169. 20th Century Corporation is a shareholder of Goldchip.

Experience in Other Cases.

170. The practice of Lyman and Ash is largely confined to class actions such as the current suit.

171. Some of the cases in which Lyman has been involved are:

1. Ash vs. Brunswick
2. " vs. Cort
3. " vs. U.S. Smelting & Refining Co.
4. Chairman vs. Kleinerts, Inc.
5. Dixon vs. Studebaker-Worthington
6. " vs. Susquehanna Corp.
7. Galfand vs. Chestnutt
8. " vs. Fletcher
9. Lyman vs. Standard Brands
10. " vs. Stokley Van Camp Corp.
11. Ott vs. Locust Lake Village, Inc.
12. Rafel vs. American Hospital Supply Corp.
13. " vs. Geneen
14. Seibert vs. BOC Corp.
15. " vs. Gulton Industries
16. " vs. Sperry Rand
17. Springer vs. Jones
18. Umbriac vs. American Snacks
19. Wood vs. Zapata Corp.

172. The dates of filing and the Courts involved in said cases are as follows:

1. Ash vs. Brunswick, filed February, 1973, Eastern District of Pennsylvania.

2. Ash vs. Cort, filed September, 1972, Eastern District of Pennsylvania, Lyman representing the Plaintiff.

3. Ash vs. U.S. Smelting Co. filed September, 1971, Eastern District of Pennsylvania.

4. Chairman vs. Kleinerts, Inc., filed December, 1973, Eastern District of Pennsylvania, Lyman and Lyman and Ash representing the Plaintiffs.

5. Dixon vs. Studebaker Worthington, filed Eastern District of Pennsylvania, summer of 1973, Lyman and Ash counsel of record for the Plaintiff.

6. Dixon vs. Susquehanna Corporation, Eastern District of Pennsylvania, summer of 1973.

7. Galfand vs. Chestnutt, filed July, 1973, approximately, Eastern District of Pennsylvania, Lyman counsel of record for Plaintiff.

8. Galfand vs. Fletcher, filed November, 1973, Eastern District of Pennsylvania, Lyman or Lyman and Ash counsel of record.

9. Lyman vs. Standard Brands, filed about March, 1973, Eastern District of Pennsylvania.

10. Lyman vs. Stokley Van Camp Corporation, Eastern District of Pennsylvania, filed September, 1974, Lyman and Lyman and Ash representing Plaintiff.

11. Ott vs. Locust Lake Village, Inc., filed Common Pleas Monroe County, October, 1972, Lyman and two others represented the Defendant.

12. Rafel vs. American Hospital Supply Corporation, Eastern District of Pennsylvania, filed May, 1974, Lyman and Lyman and Ash counsel of record.

13. Rafel vs. Geneen, Eastern District of Pennsylvania, filed March, 1972, Lyman representing Plaintiff.

14. Seibert vs. BOC Corporation filed April, 1974, Eastern District of Pennsylvania, Lyman and Lyman and Ash representing the Plaintiff.

15. Seibert vs. Gulton Industries, Lyman representing the Plaintiff, filed May, 1972, Eastern District of Pennsylvania.

16. Seibert vs. Sperry Rand, Lyman representing Plaintiff, filed June, 1972, Eastern District of Pennsylvania.

17. Springer vs. Jones, Central District of California, filed May, 1974, Lyman and Ash counsel of record for Plaintiff.

18. Umbriak vs. American Snacks, filed March, 1974, Eastern District of Pennsylvania, Lyman and Ash representing the Plaintiff.

19. Wood vs. Zapata Corporation, Eastern District of Pennsylvania, subsequently transferred to the Southern District of Texas, Lyman representing Plaintiff filed March, 1972.

173. In each of the cases above-mentioned in which the Plaintiff is named Lyman, the Plaintiff is Cletus M. Lyman, father of Cletus P. Lyman.

174. In the Umbriak vs. American Snacks case mentioned above, the Plaintifs are Mrs. Umbriak, Lyman's sister, two unmarried sisters of Lyman and Lyman himself.

175. Ash, co-counsel in the instant case, is the Plaintiff in Ash vs. Cort, Ash vs. Brunswick Corp., and Ash vs. U.S. Smelting Co.

176. None of the above cases has been tried to judgment, none has been tried to a jury, and the only case which reached a trial on its merits at final hearing is this case.

177. In Ash vs. Brunswick, Lyman acted for the Plaintiff but does not think he entered an appearance.

178. Ash vs. Cort is pending.

179. In Ash vs. U.S. Smelting & Refining Co., Lyman acted as a lawyer for the Plaintiff.

180. In Ash vs. U.S. Smelting and Refining Co., Lyman received 10% of the fee and Ash received about 40% of the fee.

181. In Chairman vs. Kleinerts, Inc., which is pending, no class action motion was ever filed.

182. Dixon vs. Studebaker-Worthington was withdrawn as moot.

183. In Dixon vs. Susquehanna Corporation, no class action motion was ever filed.

184. Dixon vs. Susquehanna Corporation is pending.

185. Galfant vs. Chestnutt is pending.

186. In Galfant vs. Fletcher, no class action motion was ever filed.

187. In Galfant vs. Fletcher, Lyman represented the Plaintiff.

188. In Galfant vs. Fletcher, summary judgment was entered for the Defendant.

189. Lyman vs. Standard Brands Corp. was concluded, in Lyman's view, unsuccessfully.

190. In Lyman vs. Standard Brands, Lyman acted for the Plaintiff but never entered an appearance.

191. In Lyman vs. Standard Brands, Lyman participated in the preliminary injunction hearing. The Plaintiff's motion for partial summary judgment in that case was denied and summary judgment was entered for the Defendant.

192. Lyman vs. Stokely Van Camp is pending.

193. In Lyman vs. Stokely Van Camp, no class action motion was ever filed.

194. In Lyman vs. Stokely Van Camp, Inc., an agreement of settlement is awaiting court action.

195. In Rafel vs. American Hospital Supply, a class action motion was filed and Lyman and Ash were co-counsel for the Plaintiff with another law firm.

196. In Rafel vs. Geneen, no class action motion was ever filed.

197. In Rafel vs. Geneen, Lyman and Ash were co-counsel.

198. In Rafel vs. Geneen, no petition for counsel fees was filed by Lyman, but David Berger filed one which covered Lyman's work.

199. In Rafel vs. Geneen, Lyman estimated that a third of the lawyer's time on behalf of the Plaintiff was contributed by Lyman and two-thirds by David Berger, P.A.

200. In Rafel vs. Geneen, Lyman and Ash received 40% of the fee.

201. In Seibert vs. Galton Industries, Lyman does not know whether an application for counsel fees was ever filed.

202. In Seibert vs. Galton Industries, no class action motion was ever filed.

203. Seibert vs. Galton Industries was dismissed.

204. Seibert vs. Sperry Rand was dismissed on its merits as moot.

205. In Seibert vs. Sperry Rand no class action motion was ever filed.

206. Springer vs. Jones is pending.

207. Part of the case of Wood vs. Zapata is still pending.

208. Before the institution of this action, Lyman represented shareholders in class or derivative actions in 11 cases.

209. In the one case where Lyman represented a Defendant, he claimed that it was agreed that he was to be paid a flat fee regardless of the outcome. Lyman testified that the fee which he charged when divided by his approximation of the number of hours involved worked out to about $50.00 per hour.

210. In the one case where Lyman represented a defendant, he claimed he was the chief attorney.

211. The action in which Lyman claimed to have represented the Defendant was a state court action and involved real estate.

212. Lyman did not bill in Ott vs. Locust Lake Village, Inc. on an hourly billing basis. Lyman's father represents Locust Lake Village, Inc. and he with Lyman were co-counsel in that case.

213. From the time of his admission to the bar on November 18, 1971 to the formation of the firm of Lyman and Ash in November, 1972, three class action cases had, in Lyman's opinion, been concluded by him successfully.

214. From the formation of the firm of Lyman and Ash in November, 1972 to the institution of this action in September, 1973, two additional class actions had in Lyman's opinion been concluded by him successfully.

215. Of 18 cases in which Lyman has been involved, eight were in his opinion concluded successfully, two are pending court approval of settlement, one was concluded unsuccessfully, one was concluded as moot and six are presently pending.

216. Lyman testified that the eight cases he designated as successful out of the eighteen in which he has participated are as follows:

Ash vs. Brunswick
Ash vs. U.S. Smelting
Galfand vs. Fletcher
Rafel vs. Geneen
Seibert vs. BOC
Seibert vs. Gulton Industries
Seibert vs. Sperry Rand
Wood vs. Zapata

217. There are 19 cases named by Lyman excluding the Leib case. The pendency or outcome of the 19th case is not known to the Court.

218. Of the pre-Leib cases in which Lyman was involved, five were class actions, three were derivative actions, and three were both derivative and class actions.

219. Of the eleven pre-Leib cases, four were concluded successful one was concluded unsuccessfully, one terminated as moot and five are presently pending.

220. Up to the present time, Lyman has acted for Plaintiffs in 20 cases, including this one, of which eleven were class actions, two were derivative actions, four were derivative and class actions, and the 19th was not included in Lyman's analysis.

221. Lyman's cases have been filed in the Central District of California, the District of Delaware, the Northern District of Illinois, the Southern District of New York, the Eastern District of Pennsylvania, and the Middle District of Pennsylvania and he has taken appeals to the Court of Appeals for the Third Circuit and the United States Supreme Court.

222. Counsel who have opposed Lyman in the above cases are as follows:

1. David Berger, P.A., Philadelphia, Pa.
2. Paul Bernstein, New York City
3. Thomas Claire, Sherman and Sterling, New York City
4. John Harkins, Pepper, Hamilton and Scheetz, Philadelphia, Pa.

5. Aaron Hartunian, Chicago, Illinois
6. S. Hazard Gillespie, David, Polk, Wardwell, et al. of New York City
7. Harold E. Kohn and Abraham Pomeroy, New York City
8. Thomas O'Neil, Jr., Montgomery and McCracken, Philadelphia, Pa.
9. Edward Rome of Blank, Rome, Klaus and Comisky, Philadelphia, Pa.
10. Henry Sawyer of Drinker, Biddle and Reath, Philadelphia, Pa.
11. Robert Tresher, Montgomery and McCracken, Philadelphia, Pa.
12. Lewis H. VanDusen, Drinker, Biddle and Reath, Philadelphia, Pa.

223. Lyman estimated that for the period September, 1973 to November, 1973, between a third and one-half of his time was allocated to the Leib case, and the balance of his time was spent almost exclusively on shareholder matters. Lyman estimated that 3% of his work was handled on a straight contingent fee basis and 3% of the work was done for poor people.

224. Lyman has never prepared any pre-trial documents in any case other than the instant case and has never tried any case before a jury.

225. Lyman testified that Ash probably never tried a case before a jury and Ash did not comment on the point later when he was a witness, although he was present when Lyman testified.

226. Prior to this case, neither Lyman nor Ash had ever sent out any notice to shareholders.

227. Lyman and Ash received fees in 1974 from the following cases listed above:

Galfand vs. Fletcher
Rafel vs. Geneen
Seibert vs. BOC
Wood vs. Zapata

228. Lyman and Ash received a fee of $78,000 in Wood vs. Zapata Corp.

229. The other counsel for Plaintiff in Wood vs. Zapata received a $160,000 fee.

230. Lyman and Ash received a fee of $7,400.00 in Galfand vs. Fletcher.

231. Lyman and Ash received a fee of $22,000 in Rafel vs. Geneen.

232. Lyman and Ash received a fee of $7,500.00 in Seibert vs. BOC.

233. The fee of $7,500.00 in Seibert vs. BOC was agreed to by counsel for the Defendants.

234. In none of the cases where counsel fees were awarded to Lyman and Ash heretofore did the Court make any inquiry in depth as to the services rendered by them.

235. Lyman testified that 3% of his time is billed at an hourly rate and that the rate is $50.00 per hour.

236. Lyman testified that he billed $1,000 in each of two cases on an hourly basis.

237. Between September 15, 1973 and November 15, 1974, only two of Lyman's clients were billed a flat fee, each for $1,000.00.

238. Lyman testified that in a case in which he was engaged in October of 1974 to divide a small family business, he agreed to bill for his services at $50.00 per hour.

239. Lyman testified that he had an hourly billing rate of $50.00 for payment assured work.

240. Ash has never had any case where he has billed a client at a regular billing rate, except his $50.00 alleged billing rate in this case.

241. Ash admitted that he had no hourly billing rate.

242. Lyman testified that in his opinion his time was worth $50.00 per hour.

The Settlement.

243. The settlement ultimately agreed upon provided, in summary, for delivery to Cosmopolitan Investors Funding Co. of $40,000 and 40,509 special preference units of 20th Century Corporation, one of the Defendants.

244. Before this suit was instituted and regardless of the outcome thereof, Cosmopolitan Investors Funding Company owned 223,118 shares of common stock of 20th Century Corporation, constituting over 10% of 20th Century's outstanding

shares. Cosmopolitan Investors Funding Co. is the largest single stockholder in 20th Century.

245. The special preference units are convertible into common stock or into debt.

246. The special preference units received in settlement will convert into debt in 1979 only if 20th Century becomes bankrupt, Consumer's Life becomes subject to a statutory receiver, or 20th Century's net worth falls below $2,000,000.00. The special preference units will convert into debt in 1985 if 20th Century does not possess a certificate of authority to do business as an insurance company in 1979 and does not secure such a certificate by 1985. Otherwise, the special preference units will convert into common stock September 15, 1979 or at a later date before 1985 if 20th Century does not possess such a certificate of authority in 1979 but acquires one prior to 1985.

247. 20th Century had a net worth on June 30, 1974 of $4,746,287.00.

248. Lyman and Ash were given an opportunity to speak at a meeting of the Board of Directors of Cosmopolitan Investors Funding Company on January 21, 1974. At that time independent counsel were employed by Cosmopolitan Investors Funding Company and thereafter that company began to take a stronger view as to the number of shares of common stock in 20th Century to which Cosmopolitan Investors Funding Company, Inc. was entitled as a result of the exchange which was the subject of this suit.

249. In January of 1974, Cosmopolitan Investors Funding Company's Board of Directors and officers decided to proceed in this action for that Company's own benefit.

250. In March, 1974, Cosmopolitan Investors Funding Company took the position that it was entitled to an additional 40,509 shares of common stock of 20th Century Corporation beyond those provided for in the original exchange. This number of shares was ultimately embodied in the settlement agreement between Cosmopolitan Investors Funding Company, Inc. and 20th Century but on the fifth day of trial was changed to 40,509 special preference units.

251. On March 14, 1974, the parties met and agreed to exchange draft settlement documents.

252. The $25,000 settlement to be paid by the individual Defendants other than Robertson was originally discussed in May, 1974.

253. The settlement entered into on August 29, 1974 between Cosmopolitan Investors Funding Co. on the one hand and 20th Century Corporation and Robertson on the other hand is the same as the settlement ultimately agreed upon except that special preference units were substituted for shares of common stock in the final agreement, the number of preference units and shares being identical.

254. There is little likelihood that the 20th Century Corporation special preference units will be converted into debt rather than into common stock.

255. The Cosmopolitan Investors Funding Company directors entered into a settlement agreement with 20th Cen-

tury and James C. Robertson, an officer thereof, without seeking concurrence of Plaintiffs' counsel.

256. The settlement with 20th Century Corporation and James Robertson was not negotiated or concluded by Lyman and Ash but was effected by counsel for Cosmopolitan Investors Funding Company.

257. There was no inclination upon the part of Lyman and Ash to accept the ultimate settlement or anything approximating it until the fourth day of the trial on the merits.

258. The parties entered into an agreement to settle the case on the fifth trial day.

259. As a set-off to the number of additional special preference units received by Cosmopolitan Investors Funding Company as a result of this litigation is the expense of this litigation to Cosmopolitan Investors Funding Company and 20th Century in which Cosmopolitan Investors Funding Company is a substantial stockholder.

260. All parties and counsel, except Ruth C. Leib and Frank Leib, named Plaintiffs, and Lyman and Ash, were willing as of November, 1973 to negotiate a settlement within the range of the ultimate settlement and continued to be so willing up to the time of the trial.

261. The settlement could have been effected earlier but for the conduct of Lyman and Ash.

262. There is no evidence from which the Court may make a determination of the difference in value between one special preference unit of 20th Century Corporation and one share of common stock of that corporation.

263. The only change in the settlement effected by Lyman and Ash was the change from common stock to special preference units.

264. There is no market for the special preference units of 20th Century and the value of such units is highly uncertain.

265. Ash testified at one point that this case was the least promising of any action enumerated by Lyman in the latter's testimony.

266. Ash also testified that he always thought from the beginning of this case that it was a very strong one because of the defective proxy.

267. Ash admitted that neither he nor Lyman knew anything about the major defect in the proxy until about a month after this case was started.

268. This case could have been settled shortly after it began on a basis which was very close to the settlement ultimately agreed upon except that the final settlement involved special preference units instead of shares of common stock.

Compensation of Other Counsel.

269. Lyman testified that $50.00 per hour is the normal billing rate for lawyers of three years experience in Philadelphia.

270. The hourly billing rate of Perry Bechtle, and Barry Greenberg, counsel for Cosmopolitan Investors Funding Company, was $75.00 and $50.00 respectively and the fee of

that firm in this case was approximately $50.00 per man hour for the time expended by Bechtle, Greenberg, and other lawyers in the firm.

271. Members of the firm of McNees, Wallace and Nurick who worked on this case were Rod J. Pera, Jeffrey Jamouneau, and H. Lee Roussel.

272. Rod J. Pera is 33 years of age and was admitted to the bar of the Supreme Court of Pennsylvania in November of 1965.

273. The hourly rate of Rod J. Pera was $50.00 per hour beginning October 1, 1973 and $55.00 per hour beginning October 1, 1974.

274. The rating of Rod J. Pera in Martindale-Hubbell was changed within ten days of the hearing on December 18, 1974 from "cv" to "bv".

275. When Pera held his "cv" rating, it was the highest available for his years in practice.

276. Mr. Jamouneau's hourly billing rate is the same as Pera's.

277. Mr. Roussell's hourly billing rate is $40.00.

278. The firm of McNees, Wallace and Nurick sometimes bills the client for paralegal services when the particular services are of the type that an attorney would perform.

279. Law students in the firm of McNees, Wallace and Nurick are not considered as paralegal personnel and are assigned an hourly billing rate of $10.00.

280. One of the paralegal personnel in the firm of McNees, Wallace and Nurick indexed the depositions in this case.

281. The law firm of McNees, Wallace and Nurick may or may not bill a law student's time at the discretion of the particular billing attorney; if the time is billed, it is billed at no higher than $10.00 per hour and is sometimes billed at $2.50 per hour.

282. McNees, Wallace and Nurick billed 20th Century and also Cosmopolitan Investors Funding Company. The firm of McNees, Wallace and Nurick cancelled certain time spent by attorneys in that office in this case; for example, there was no billing for Roussel's trial time when Pera or Jamouneau was present.

283. The actual time spent by McNees, Wallace and Nurick on this case through October 31, 1974 was between 1095.55 hours and 1265.1 hours, the difference being attributable to matters on the bill of November 2, 1974 which may have covered other services to the same clients.

284. The paralegal personnel in the firm of McNees, Wallace and Nurick keep daily time sheets as do the lawyers.

285. The bill of McNees, Wallace and Nurick to 20th Century in connection with this case for expenses and fees from September 1, 1973 through July 31, 1974 is no less than $46,014.54 and no greater than $49,060.44.

286. The bill of McNees, Wallace and Nurick to Cosmopolitan Investors Funding Company for the period September 24, 1973 through October 13, 1973 for expenses

and services is no greater than $6091.80 but is a substantial portion thereof.

287. Thirteen witnesses were deposed on 15 days.

288. Lyman claimed that when Lyman and Ash both attended a deposition, there was no duplication of effort involved.

289. Lyman claimed to have spent 68.8 hours over-all in preparing for and in attendance at the depositions.

290. Ash claimed to have spent about 31 hours preparing for the depositions and 40.5 hours at the depositions.

Miscellaneous.

291. The Court at the start of the trial on the merits notified counsel for Plaintiffs that it had considered dismissal of the case because of the poor quality of the pre-trial documents and the poor quality of the preparation of the case by Plaintiffs' counsel.

292. Lyman and Ash received no help in this case from the Securities and Exchange Commission.

293. The general counsel of the Securities and Exchange Commission, although requested by Lyman and Ash to do so, refused to intervene in this case and conducted his own independent investigation.

294. Lyman and Ash made four applications in this case for temporary restraining orders and preliminary injunctions plus one request for reconsideration of a denial of a preliminary injunction. None were granted.

295. There is listed in the petition of Plaintiffs' counsel an item payable to the Pennsylvania Group for the fee of expert witness Michael K. Conn in the amount of $1480.01. At the trial on the expense portion of this case no testimony was presented as to how the bill was arrived at or the rate per man-hour-day for the witness Conn. After all the testimony was in on the expenses and the Court was hearing testimony on counsel fees, Lyman submitted a revised bill received by Lyman December 13, 1974 which indicated that Conn had expended 110.75 hours in this case translatable into 13.75 man-hour-days at $100.00 per day and expenses of $105.01, making a total of $1480.01.

296. These findings are based on the Judge's notes of the hearing. The Judge was not aware until March 26, 1975 that a transcript had been partially prepared and on that day the transcript of the first four days of the hearing was filed.

Credibility.

297. The books of account and the time records of Lyman and Ash are untrustworthy.

298. The testimony of each Messrs. Lyman and Ash is not credible.

3. Discussion

The leading case in this Circuit on the factors to be considered in awarding counsel fees in a class action of this type is Lindy Bros. Builders vs. American Radiator, 487 F.2d 161 (3d Cir. 1973). Our function is to compensate the petitioning attorneys, Lyman and Ash, for the reasonable value of their services to the extent that those services benefited the class, excluding Mr. and Mrs. Leib who were individually represented by Lyman and Ash.

The practice of Lyman and Ash is almost exclusively of the type involved in this case and compensation in 90% of their practice is the result of court awarded fees. We are mindful of the admonition in Wright and Miller, Federal Practice and Procedure, § 1803 at page 292, and in Manual for Complex Litigation § 1.47 that we should not encourage class suits by generosity in the awarding of counsel fees and expenses or even create an impression to that effect, and that the class action device should not be the source of strike suits promoted by counsel to enrich themselves. See City of Detroit vs. Grinnell, 495 F.2d 448, 468-470 (2d Cir. 1974).

Lindy Bros. vs. American Radiator, *supra*, sets forth three primary matters to be considered by the Court in arriving at fair compensation, a dollar amount based on an hourly rate, the contingent nature of success in the case and the quality of the attorney's work. Each of these three basic considerations is further divided into its component factors.

In tracking *Lindy*, we attempt first to arrive at an amount on an hourly basis. How many hours were spent by counsel, in what manner were they spent, what is counsel's normal billing rate, and what is attorney's legal reputation and status? An underlying premise of *Lindy* is that counsel shall keep time records fairly and with reasonable accuracy. Any lawyer who applies to a court for substantially all of his fees is particularly obliged to keep accurate time and expense records. In Re Four Seasons Securities Laws Litigation, 59 F.R.D. 657 (W.D. Okla., 1973); Rosin v. Hart, 182 F.2d 745 (9th Cir. 1950); Stein vs. Hemker, 157 F.2d 740 (8th Cir. 1946). Counsel were advised from the bench about February 14, 1974 and considerably before the action was converted into a class action that any application for fees must be supported by complete detail showing the date of each service, the amount of time spent on each date, the service rendered, the name of counsel rendering the service and his regular hourly billing rate. Despite the holding in *Lindy* which came down October 31, 1973, and despite this Court's clear warning to counsel of what would be expected, no time records whatsoever were kept by them from November 1, 1973 to June 16, 1974.

The amount of hours claimed for the period up to June 16, 1974, is an estimate by counsel based solely upon an examination of the file. Beginning with the week ending June 23, 1974, counsel purported to keep time records.

Ash admitted that he occasionally made up his time records for a week at the end thereof. Any lawyer should know that it is necessary to keep time records concurrently on the date of the services because they are extremely difficult to reconstruct even one day later, and are almost impossible to reconstruct two or more days later. Lyman's time records contain grossly inflated entries. As an example of such inflation, on August 5, 1974 Lyman entered two hours in his time records for five extremely brief letters, and on August 13, 1974 entered another two hours for four brief letters. None of these letters required any preparation prior to dictation and the total amount spent on the 9 letters could not reasonably have exceeded 20 minutes. To have entered four hours for these simple letters is egregious and is evidence that these time records are a sham. Furthermore, there is internal evidence in the time records that they were not concurrently kept as will appear from a cursory examination of the two sheets for the week ending July 28, 1974. The primary emphasis by counsel in their time entries was to secure an exorbitant counsel fee. In my view, the time records of Lyman and Ash are not trustworthy.

After estimating the amount of time spent, petitioning counsel arbitrarily increased the same by an additional 25% to compensate for routine correspondence, time spent out of the office on overnight trips and other matters allegedly not reflected in counsels' time records and first estimate. This would, of course, increase the spurious four hour correspondence entry to a five hour charge.

Lyman claims compensation at $50.00 per hour and Ash claims at $60.00 per hour. At most, Lyman was paid on a non-contingent basis in two cases, and in each received a fee of $1,000.00. He claims that he has an agreement to be paid $50.00 per hour in a case involving a division of a small family business. In my view, Lyman has no normal billing rate. Lyman's testimony that he had an hourly billing rate of $50.00 is not believable. Ash admitted that he had no normal hourly billing rate.

Neither one of those attorneys has any rating in Martindale-Hubbell nor is either named in any prestigious list of lawyers. Neither attorney is a member of the Pennsylvania or American Bar Associations. Neither testified that he was a member of the Philadelphia Bar Association. Lyman is a member of the Luzerne County Bar Association. I conclude that neither attorney has anything other than a minimal legal reputation.

Neither of these attorneys has ever tried a jury case and until the instant action, neither had ever tried a case beyond the preliminary injunction stage. I conclude that $20.00 per hour for office work and $30.00 per hour for court work would be ample compensation for these attorneys if there were any credible number of hours to which these factors could be applied.

What is the credibility of Lyman and Ash?

I have applied the time-honored tests for determining their credibility as witnesses, including their attitudes, demeanor, and behavior while on the stand, their interest in the outcome of these proceedings, their inclination to speak truthfully or not, the probability or improbability of their statements and all other facts and circumstances in evidence.

As witnesses, both Lyman and Ash were evasive and the testimony of each witness was inconsistent within itself. For instance, Ash first testified that he did not know his rating in Martindale-Hubbell and then admitted that he had looked up his rating in the courtroom during the prior recess. As another example, he testified first that this was a weak case, and later that he always thought it a strong case; he based is view of the strength of the case on the defective proxy statement and then admitted that he was unaware of the primary defect in the proxy until about one month after the case started.

Lyman was extremely evasive throughout most of his testimony. He testified that he had represented the Defendant in a state court class action, then he later testified that he was co-counsel, and ultimately admitted that the Defendant was his father's client. His testimony as to those cases in which he claimed to be compensated on an hourly basis, his testimony as to the firm's other clients and his testimony as to the "dinners for staff overtime" was likewise most evasive and inconsistent.

The interest of Lyman and Ash in the outcome of the proceedings needs no comment. In my view they are not inclined to testify truthfully. Some of their testimony was highly improbable, such as Ash's testimony that he used as a rule of thumb that if there was doubt as to a particular time charge, he favored the client, not himself, in this case.

It is with great reluctance that I find lawyers wanting in integrity and, so far as I can recall, this is only the second time it has been my unpleasant duty to do so. Considering all the facts and circumstances in evidence, including but not limited to false entries in Lyman's time records, improper characterization of the college student bookkeeper and filing clerk as a paralegal (Findings of Fact ¶'s 95-98) and deceitful camouflaging of personal living expenses under "Dinners for Staff (overtime)" (Findings of Fact ¶'s 68-79), I am obliged to conclude that the testimony of Lyman and Ash is not worthy of belief and I reject it.

The burden of proof is on Lyman and Ash in this proceeding. Without the benefit of accurate time records and with no faith in the credibility of these attorneys, I am unable to make any finding of the amount of time actually expended by them in this case. One of the basic tests of *Lindy* cannot be met.

To make an estimate of the amount of time reasonably spent by counsel would be pure conjecture. If counsel are to receive any fees, I must use some other approach, such as straight *quantum meruit*.

In determining a factor for the quality of the attorneys' work, we should consider the complexity and novelty of the issues, the quality of the work observed by us and the amount of recovery or benefit to the class.

Plaintiffs sued for recision of the sale of Cosmopolitan Life to 20th Century Corporation. The case really turned in large measure on defects in the proxy statement issued in connection with the sale of Cosmopolitan Life. About a month after this suit was started, newspapers carried an account of a fine levied by the Insurance Commissioner of Delaware against 20th Century in the amount of $25,000 which involved a proceeding which was not disclosed in the proxy statement but should have been disclosed. This unexpected fine clinched Plaintiffs' case and started settlement discussions in November of 1973 although it was not until 9 months later and five days of trial that Plaintiffs were willing to settle. Although Plaintiffs' counsel denominated this case a complex one, in my view it would not so qualify. Many of the cases processed in this court are far more complex. In my view, nothing should be added to the compensation in this case for novelty or complexity of the issue.

The factor relating to the quality of the work is designed to take into account any unusual degree of skill exhibited by counsel. In determining the quality of the work in this case, the Court is entitled to rely on its own observations of the documents filed and the conduct of counsel at the hearings on the merits together with a consideration of the experience of Plaintiffs' counsel in other cases and the effect they had in producing the settlement in this case.

The actual quality of the work was poor. The practice order issued in this case on October 4, 1973 specified in detail the complete pre-trial procedure to be followed including a pre-pretrial meeting of counsel, exchange of witness and exhibit lists, an attempted agreement on admissibility of exhibits, specification of portions of depositions to be read, preparation of a statement of contested issues, statement of uncontested facts, proposed findings of fact, conclusions of law, and trial briefs. A careful tracking of the practice order assures that a case is well-prepared for trial. Poor pre-trial documents usually indicate that the case is ill-prepared.

When the trial started, I characterized Plaintiffs' pre-trial documents as among the worst I had ever seen. At that time I did not know that these were the first pre-trial documents prepared by either Lyman or Ash. At that time I did not know that neither Lyman nor Ash had ever tried a case to a jury and neither had ever tried a case beyond the preliminary injunction stage. The fact that the hearing on the expenses took three days and the hearing on counsel fees took an additional 4³/₄ days is in itself some indication of the lack of experience of Plaintiffs' counsel. The many applications for preliminary injunctions and the several motions for continuance appear, in retrospect, to have been frantic efforts to prevent this case

from going to trial. I conclude that the fee should properly reflect the poor quality of the work.

What was the amount of recovery, if any, resulting from Lyman and Ash's efforts? In viewing this litigation as a whole, Lyman and Ash can legitimately claim credit for (1) starting the suit, (2) prodding Cosmopolitan Investors' Funding Company into asserting its rights vigorously against 20th Century and against Cosmopolitan's former officers and directors and (3) changing the shares to be received in settlement to an equal number of special preference units. The $25,000 settlement with the individual Defendants and the settlement involving the $15,000 cash and 40,509 increased shares from 20th Century were achieved by special counsel to Cosmopolitan Investor's Funding Company. Lyman and Ash were instrumental in the employment of such special counsel by Cosmopolitan Investor's Funding Company and to this extent the settlements achieved by that special counsel are to some degree attributable to Layman and Ash.

Counsel had agreed in May, 1974, upon a settlement with respect to the claims in the complaint directed against Robert Nelson and the other individual defendants, save James Robertson. Despite this, considerable pre-trial activity was conducted by Lyman and Ash after May, 1974 with respect to these individuals. There is no question in my mind that settlement of this case could have been effected sooner and more for the benefit of the clients involved, but for the obstructive tactics by Lyman and Ash.

Obviously, there should be no addition to the fee simply for starting the suit. Prodding Cosmopolitan later into asserting its rights has been of real value to the Plaintiff class but ownership by Cosmopolitan of 10% of 20th Century stock somewhat dilutes that value.

The amount which should be attributable to the change from common stock to special preference units is a more difficult question. There is no evidence whatsoever on the value of one of these special preference units vis-a-vis a share of common stock of 20th Century. Common stockholders are entitled to receive dividends and to vote. Holders of these special preference units possess neither of these rights. On the other hand, these special preference units will convert into debt under certain circumstances and on failure of 20th Century, holders thereof would be in a position superior to that of stockholders. The main value, if any, in these units rests in the protection to holders thereof if 20th Century should fail. 20th Century had a net book value of $4,746,287 on June 30, 1972 which has probably risen since then. To determine that these special preference units are worth more or worth less than common stock on the basis of the evidence is impossible. As a matter of pure speculation, I would guess that they are worth slightly more than common stock, although there is no market for these units. I would add slightly to the fee for this alteration of the type of corporate security.

There was no private agreement guaranteeing payment to counsel regardless of the outcome. Lyman and Ash agreed with Mr. and Mrs. Leib to look solely to the court for an award of fees and also agreed that they would advance all expenses, save for an initial payment by Mrs. Leib of $500.00, without right of reimbursement from the clients. I would allow a 20% increase to cover the contingent nature of the case.

While each defect in the petitions for fees and expenses, in petitioner's records or lack thereof, and in petitioners' testimony may not in and of itself vitiate the claims, all of them taken as a whole compel the conclusion that this Court should award fees and expenses drastically below those claimed.

On a *quantum meruit* basis in which all the foregoing factors, except ethical matters, have been weighed, I conclude that a fair counsel fee to Plaintiffs' counsel, but for their fraud, would be $6,000.00.

We have diligently searched for a case squarely on the question of whether it is proper for a court to deny all fees and expenses applied for by counsel in a petition based or framed in part on fraud and deceit. There is apparently no such case. But see Trustees of the Internal Improvement Fund vs. Greenough, 105 U.S. 527 (1882) which allowed counsel fees noting, "[i]t is not shown in this case . . . that any of these allowances are excessive, or that the expenditures allowed were not fairly and honestly made." See also Blau vs. Rayette-Faberge, Inc., 389 F.2d 469 (2d Cir. 1968); Magida vs. Continental Can Co., 231 F.2d 843, 848 (2d Cir. 1956), c.d. 351 U.S. 972 (1956), on remand 176 F.Supp. 781 (S.D. N.Y. 1956). This application for fees and expenses is an equitable proceeding and general principles of equity are applicable. Trustees of the Internal Improvement Fund vs. Greenough, *supra;* Sprague vs. Ticonic National Bank, 307 U.S. 161 (1938). One such principle is that one seeking equity must do equity. These petitioning attorneys are not only guilty of violations of the Code of Professional Responsibility with respect to their clients by their excessive claims,[1] but also have attempted to perpetrate a fraud on this court by the filing of these false petitions. I have given very serious and lengthy consideration to denying petitioning counsel all fees and expenses and have concluded that such a denial would not be in accordance with the law as it has developed to date although that is what I firmly believe the law should be. On the other hand, it is in my view that it would be improper fully to compensate counsel who fraudulently attempt to pervert the judicial process. This Court is entitled to expect of counsel that they will conform to the traditions of the profession. These counsel have failed. The Court reduces the fee to $3,000.00 to reflect a penalty for their fraudulent conduct. See Blau vs. Rayette-Faberge, Inc., *supra;* Magida vs. Continental Can Co., *supra.*

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[1] D.R. 2-106.

There are numerous deficiencies in the claim for reimbursement for expenses, particularly in the categories designated on Schedule A, p. 9 in the Summary of Expenses as "Dinners for Staff (overtime)," Printing, Travel, Long Distance Tel. Calls, Paralegal Services, Copying, Witness Fees, and Notes of Testimony. These deficiencies will each be treated briefly with appropriate references for detail to the Findings of Fact.

Had the schedules attached to the petitions for counsel fees and expenses been accurate, the hearing thereof would probably not have exceeded one day and the Court would have been in a position immediately at the conclusion of the hearing to enter an award which would have been fair. Such was not the case. Reimbursable expenses must be reasonable and necessary under all the circumstances in the case. The individual Plaintiffs, Mr. and Mrs. Leib and Mr. and Mrs. Yenchko, while undoubtedly fine people, really did nothing in this case except testify and appear as spectators at the hearings. Although they assured this Court when they were named representatives of the class that they would scrutinize counsel fees and expenses, they never did so. Thus the burden falls squarely on the Court.

The records of this firm are deplorable. From the firm's inception in November, 1972 to June, 1974, no ledgers or journals were kept and the only financial record was a checkbook unbalanced for that whole period. (Findings of Fact ¶'s 53 and 54). A bookkeeping system installed in June, 1974 by the student part-time bookkeeper was kept in pencil and erasures and changes were made therein (Finding of Fact ¶56). No records were kept of out of pocket expenses (Finding of Fact ¶61). Even after three days of hearings on the expenses, the accuracy, necessity, and reasonableness of a very large proportion of the expenses remains in doubt.

The "Dinners for Staff (o.t.)" items total $178.47. Lyman and Ash had no full time staff. The word "staff" in this case must mean the two part-time legal secretaries hired for after hours' work and the part-time bookkeeper. The law student paraprofessionals were not involved in claims under this category. There are seven dinners involved, all at Philadelphia restaurants. There was testimony with respect to the December 11, 1973 item R. Ash/Dinner for Staff (O.T.) that this was reimbursement for a dinner for Margie Turner, one of the secretaries. This small item will be disregarded in the following discussion. Of the remaining six dinners, Lyman attended all six, Ash attended five, Margie Turner attended two, and

Donald W. Rome and René Walton each attended one. (Findings of Fact ¶'s 68-77). The charges on these six dinners were $173.10, averaging $11.61 per plate. It seems highly unusual to charge a client for meals served to employees while these persons are not in a travel status. I would normally consider these overhead items for which counsel are not entitled to reimbursement. However, it is inexcusable for Lyman and Ash to conceal under the designation "Dinners for Staff (o.t.)" the 11 meals served themselves. Lyman and Ash clearly are not staff. All of the dinners were at Philadelphia restaurants and only one could conceivably be considered a dinner in travel status. The cost of at least 9 of these 11 meals served Lyman and Ash is a personal living expense. Claiming reimbursement under the five deceptive entries on the Schedule as "Dinners for Staff (o.t.)" is a flagrant attempt to perpetrate a fraud on this court and along with the fraudulent time entries involved a clear violation of Disciplinary Rule 1-102(a) of the Code of Professional Responsibility which provides in part:

> "A lawyer shall not:
>
> (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.
>
> (5) Engage in conduct that is prejudicial to the administration of justice."

Included in the printing charge is an item of $50.00 to Alina Radziejowska for preparing a design of notice to shareholders (Finding of Fact ¶ 126). Lyman claimed to have been displeased and shocked with the form of shareholder notice concerning the settlement. A notice is a notice and the Radziejowska design is not $50.00 better than the settlement notice. This $50.00 item is an illustration of a completely unnecessary expense.

The items for travel are listed on the schedule of expenditures under the date paid with no indication of the date the particular charge was incurred. For example, under July 21, 1974 there is an entry showing a trip to Harrisburg. Actually this was payment for two items, one of which was five months previous, and the date of the other was not identified. (Finding of Fact ¶ 111). Another type of impenetrable listing is illustrated in Findings of Fact ¶'s 118 and 119. These items are dated November 4, 1974, the date of payment of the September credit card billing, but the dates of the incurring of the three expenses and the matters to which they relate are completely unidentified, even after the hearing. It is next to impossible to audit expenditures so listed.

Lyman and Ash request reimbursement for telephone charges of $847.99. Up to the date of the hearing on expenses no daily, weekly or monthly log or individual chit system was kept of long distance telephone calls. No attempt was made, at least until either June or July, 1974, to allocate to this case and other cases the telephone charges from the monthly bills for the period beginning September, 1973. (Findings of Fact ¶'s 100-105). I have no confidence that the telephone bills were fairly and accurately apportioned among the various clients by Lyman from the telephone bills.

Counsel request reimbursement for paralegal services in the amount of $781.05. A paralegal person is one skilled in the delivery of legal services.[2] The alleged paralegals are a recent law school graduate, a third year law student, and a student at the Wharton School of the University of Pennsylvania majoring in accounting. (Findings of Fact ¶'s 90-95). The student part-time bookkeeper and filing clerk does not qualify by experience or training as a paralegal person. The services of the bookkeeper in driving counsel to the trial, gathering papers shortly before the trial and incidental services with the files at the trial (Finding of Fact ¶97) do not rise to the dignity of paralegal services.

As to photocopying charges out of the office, a number are for copying court opinions for counsel (Findings of Fact ¶'s 80-82). Counsel have no library worthy of the name (Finding of Fact ¶28) and these photocopying expenses were to remedy that situation. Library expenses are overhead and these expenses in substitution thereof are likewise overhead. See Locklin v. Day Glow Color Corp., 378 F.Supp. 423 (N.D. Ill. 1974). On Schedule A, p. 6 attached to the petition for expenses is an item: "Sept. 15 [1974]/Xerocenter/Copying 5306 sheets for appendix $217.18." This probably relates to the appeal to the Court of Appeals for which a docket fee of $50.00 was paid June 4, 1974. The appeal was from denial by this Court of a preliminary injunction and was taken despite the fact that on February 14, 1974 the hearing on the final injunction was scheduled high on the list of cases to be tried beginning July 30, 1974. It was unlikely that the Court of Appeals would reverse the failure to grant a preliminary injunction in light of the posture of the case. If the above charge

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[2] Statsky, Introduction to Paralegalism, p. 2 (1974).

of the Xerocenter was for an appendix to the appeal papers, that charge and the $50.00 filing fee were both unwarranted. The time charge for the attorneys incident to the appeal was also unwarranted. A charge for photocopying in the office was estimated hurriedly by Lyman at $150.00 (Findings of Fact ¶'s 86-88). No log or other system for entry of such charges was kept. I cannot ascertain whether or not this estimate is reasonably accurate.

Witness fees of $2378.16 are requested. The largest witness fee is for the expert Conn and amounts to $1480.01. The witness asserts that he spent 100.75 hours on this case. Much of it was in educating Lyman and Ash on the insurance business. Claiming for the hours of the witness and also of counsel for learning from the witness involves a duplication of charges. The attorney fee was reduced in part for this duplication. Fraiman Estate, 408 Pa. 442 (1962).

The largest category of expenses is "Notes of Testimony $2939.51." Much of this relates to depositions and some of the depositions appear to me to have been skirmishing and unnecessary. Bearing in mind that this case could have been settled within the range of final settlement within two to six months after it started (Findings of Fact ¶'s 250, 251, 257, 260, 261, and 268), and that the amounts paid or to be paid after June 7, 1974 for depositions is $2339.81, a considerable part of the depositional charges, and counsel's time at depositions as well, was unnecessary.

Disciplinary Rule 5-103(B) of the Code of Professional Responsibility provides in part ". . . a lawyer shall not advance or guarantee financial assistance to his client except that a lawyer may advance . . . the expenses of litigation . . . provided the client remains ultimately liable for such expenses." The Rule applies to class actions. Ortiz vs. Englebrecht, 61 F.R.D. 381 (D.N.J. 1973). There was a clear violation of this Disciplinary Rule by Lyman and Ash. See P.D.Q. Inc. of Miami vs. Nissan Motor Corp., 61 F.R.D. 372, 377-381 (S.D. Fla. 1973).

Counsel request an award of expenses of $10,427.86. I consider that under all the facts and circumstances in this case an award of 60% of the expenses claimed by counsel is equitable. This will result in an award to counsel of $6,256.72 in expenses.

4. Conclusions of Law.

The Court reaches the following conclusions of law:

1. Lyman and Ash attempted to perpetrate a fraud on this Court in their claims for counsel fees and expenses.

2. Time entered on the time records of Lyman and Ash was intentionally inflated by Lyman.

3. Lyman and Ash fraudulently claimed reimbursement in their petition for expenses for personal living expenses and intentionally camouflaged such items by designating them "Dinners for Staff (o.t.)" in the petition for reimbursement.

4. Lyman and Ash violated their fiduciary duty to their clients in this case by attempting to secure a fee far in excess of that to which they were reasonably entitled, well knowing that the fee claimed was excessive.

5. Lyman and Ash violated their fiduciary duty to their clients by attempting to secure reimbursement for expenses for which they were not entitled to reimbursement, well knowing that they were not entitled to such reimbursement.

6. Donald W. Rome is not a paralegal person.

7. The case against 20th Century and Robertson could have been settled within two months of the institution of this suit on almost the same basis as the settlement ultimately approved by this Court except that the ultimate settlement encompassed preference units rather than shares of common stock.

8. The case against the other individual defendants could have been settled in May, 1974 on the same basis as the settlement ultimately approved by this Court.

9. But for the suit instituted by Ruth C. Leib, et al., who were represented by Lyman and Ash, the number of shares of 20th Century common stock or special preference units which Cosmopolitan Investors' Funding Company would have received would probably not have been as great as those reflected in the settlement approved by this Court and but for the actions of Lyman and Ash would have been common stock and not preference units.

10. The preference units embodied in the settlement approved by this Court have some qualities of debentures and some qualities of stock.

11. If 20th Century Corporation were to fail, the preference units would participate in a distribution of 20th Century assets before common stockholders.

12. It is impossible to determine accurately the amount of time expended by Lyman and Ash in this case.

13. It is impossible to determine accurately the amount of expenses to which Lyman and Ash would be entitled in this case, despite extensive consumption of this Court's time in an attempt to ascertain such amount.

14. The services of Lyman and Ash were of some value to Cosmopolitan Investors' Funding Company and the stockholders thereof.

15. Neither Lyman nor Ash had prior to trial of this case any trial experience whatsoever except in several preliminary injunction hearings.

16. But for the fraud attempted to be perpetrated on this Court, Lyman and Ash would be entitled to reasonable attorneys' fees of $6,000.00. Because of such fraud, the amount of reasonable attorneys' fees to which Lyman and Ash are entitled is $3,000.00.

17. Lyman and Ash are entitled to reimbursement for expenses in the amount of $6256.72.

18. Despite the lack of records, Ruth C. Leib is entitled to reimbursement for transportation and meals in connection with her services in this case in the amount of $400.00.

19. Despite the lack of records, Frank C. Leib is entitled to reimbursement for transportation in connection with his services in this case in the amount of $200.00.

20. Despite the lack of records, Andrew Yenchko and Mary Yenchko are entitled to reimbursement for transportation and meals in connection with this case in the amount of $45.00.

An appropriate order will be entered.

MUIR,
United States District Judge.

Dated: March 28, 1975.

UNITED STATES DISTRICT COURT
For the Middle District of Pennsylvania

In the Matter
of
GOLDCHIP FUNDING COMPANY AND COSMOPOLITAN INVESTORS FUNDING COMPANY,

RUTH C. LEIB AND FRANK B. LEIB, *et al.*,
Plaintiffs,
vs.
20TH CENTURY CORPORATION, *et al.*,
Defendants.

Civil No. 73-551
(Complaint Filed 9/27/73)
(Judge Muir)

ORDER.

1. Cosmopolitan Investors' Funding Company shall pay to Lyman and Ash within 30 days as reasonable counsel fees $3,000.00.

2. Cosmopolitan Investors' Funding Company shall pay to Lyman and Ash within 30 days as reimbursement for expenses incurred $6,256.72.

3. Cosmopolitan Investors' Funding Company shall pay to Ruth C. Leib $400.00, shall pay to Frank Leib $20.00, and shall pay to Andrew Yenchko and Mary Yenchko $45.00 as reimbursement for their expenses in this case, all within 30 days.

4. The Clerk shall transmit a copy of the Court's opinion filed today, and a copy of this order forthwith to the Disciplinary Board of the Supreme Court of Pennsylvania for such action, if any, as that Board deems appropriate.

5. As soon as a transcript of the hearings on counsel fees and expenses is prepared, the Clerk shall transmit a copy thereof to the Disciplinary Board of the Supreme Court of Pennsylvania.

MUIR,
United States District Judge.

Dated: March 28, 1975.

APPENDIX L

Order of the United States District Court, Dated December 19, 1974

UNITED STATES DISTRICT COURT
For the Middle District of Pennsylvania

In the Matter of
GOLDCHIP FUNDING COMPANY AND
COSMOPOLITAN INVESTORS FUNDING COMPANY,

RUTH C. LEIB and FRANK B. LEIB, et al.,
Plaintiffs,

vs.

20TH CENTURY CORPORATION, et al.,
Defendants.

Civil No. 73-551
(Complaint Filed 9/27/73)
(Judge Muir)

December 19, 1974

THE BACKGROUND OF THIS ORDER
IS AS FOLLOWS:

On December 16, 1974, counsel in the above-captioned class action case filed a motion and brief that the undersigned judge recuse himself from further proceedings on the basis of an alleged bias or prejudice towards Plaintiffs' attorneys. An oral motion to the same effect was made on December 5, 1974. The December 5 motion and the December 16 motion were both denied from the Bench. The purpose of this order is to set forth more fully the reasons for the denial of the motions.

On September 27, 1973, the attorneys for Ruth C. Leib, et al. filed a shareholder derivative action against several named Defendants. After two hearings on Plaintiffs' application for class action status the Court permitted the case to proceed as a class action. During one of those hearings the Court stated that in any future request by the attorneys for Plaintiffs for an award of attorney's fees, full and complete details would have to be presented to the Court to support any such fee petition. On August 7, 1974, the Court wrote the attorneys for Plaintiffs the following letter:

> "Your motion for award of reasonable expenses incurred in opposing motion to compel answers to interrogatories has been received.
>
> "I very clearly advised all counsel from the bench early in this case that upon any application for award of counsel fees or expenses, or both, data must be supplied to the Court covering, among other things, the following:
>
> > "The dates on which each service was rendered.
> >
> > "Time spent on each date.
> >
> > "The service rendered.
> >
> > "The regular hourly rate for the attorney involved.

> "Your motion does not specify dates and the amount of time spent on each date.
>
> "The application should be under oath."

Cletus P. Lyman and Richard A. Ash of the firm of Lyman and Ash, Philadelphia, Pennsylvania, have filed an application for an award of reasonable attorney's fees. This followed the presentation of an unfiled petition for attorney's fees at the time of the hearing with respect to the propriety of the settlement agreement. The application listed so-called "identifiable expenses" and so-called "identifiable counsel fees." The hearing on the counsel fees and expenses has lasted for eight trial days.

The motion and affidavit filed by Mr. Lyman and Mr. Ash for recusal followed several days of close scrutiny by the Court into patent inconsistencies and excesses in Plaintiffs' application for reimbursement of expenses.

The motion by the attorneys is deficient in two respects. First, 28 U.S.C. §144, which covers the instant situation, requires that the affidavit alleging bias of a judge be executed by "a party to any proceeding..." Second, even if all the allegations of Mr. Lyman and Mr. Ash are taken as true, the affidavit is not sufficient on its face to demonstrate bias or prejudice of the undersigned judge.

It is clear from prior cases on this subject that the only person entitled to file an affidavit of bias is the party to the litigation. While the application being considered by the Court at this time is presented on behalf of the attorneys of the class representatives, the ultimate responsibility for supervising the actions of the attorneys rests in the class representatives. It is from the fund created for the class that Mr. Lyman and Mr. Ash will draw their fees. The most important pecuniary interest to safeguard even at this point of the litigation is that of the shareholders for whom Plaintiffs' attorneys helped to secure a recovery. The fact that the class representatives have not signed the affidavit of bias submitted by their attorneys may indicate the willingness of those class representatives to have this matter proceed under the aegis of the undersigned judge. In order to determine whether an allegation of bias is due to some personal interest of an attorney, as opposed to a real concern with respect to the fairness of the judge to the litigants, it is necessary to have those litigants sign the affidavit submitted to the Court.

The affidavit of bias is insufficient on its face because all of the allegations reflect a studied effort by the undersigned judge to ascertain the legitimacy of Plaintiffs' attorney's application for reasonable attorney's fees. It is to be noted, of course, that no jury is involved in this case and that the proceeding is equitable in nature. Attorneys coming into court for an award of attorney's fees from a fund created for a class of individuals are in a fiduciary capacity and the judge has the obligation to examine the application in the same manner as a judge approving an expense of any other fiduciary.

The instances of bias cited by the attorneys in this case, taken as true and as made in good faith, show no more than the undersigned judge fulfilling his responsibility.

Paragraph No. 1 of the affidavit of bias states that the undersigned judge was doubtful as to whether certain bookkeeping entries regarding expenses were made contemporaneously with the expenses. A judge's disbelief in certain testimony, when he is sitting as a judge in equity who is to make findings of fact, is not unusual. Paragraph No. 2 cites a particular comment of the court to which Mr. Lyman and Mr. Ash took particular umbridge. The comment was: "I think it is only fair to tell you, Mr. Lyman and Mr. Ash, that I am very troubled as to whether or not there has been an attempt to perpetrate a fraud on this court by you gentlemen." The Court's statement was intended to be of benefit to the applicants, so that their petition would not be disallowed without giving them an opportunity to support their application fully for attorney's fees. See Foster vs. Medina, 170 F.2d 632 (2d Cir. 1948). Paragraph No. 3 states that the Court suggested that the attorneys were deliberately delaying calling themselves as witnesses on the matter of the fee petition. Without commenting on the truthfulness of this paragraph, such a suspicion reflects nothing more than the court's legitimate observation of an attorney's conduct. Observations intended to evoke proper and responsible conduct by an attorney do not constitute a sufficient showing of bias. Paragraph No. 4 once again deals with an allegation that the court accused the attorneys of delay. The sufficiency of this paragraph is guided by the same principles as those expressed with respect to ¶3. Paragraph 5 states that the Court showed an unwillingness to believe that the attorneys have spent as many hours as claimed in a certain period of time, for which there were time records available. The affiant cites the court's observation concerning its estimates of the average productive hours of a hard-working attorney. It can only be reiterated that the Court's expressing doubt as to an asserted fact and requiring a high degree of proof in a proceeding such as the present one is clearly within its authority. No facial bias is made out by the attorney's assertion in ¶ 5. In ¶ 6 affiants accuse the Court of bias because the Court commented on the evasiveness of attorney Lyman's testimony. The Court believes that pointing out situations where it believes evasiveness to be present showed not bias but concern that the most accurate facts are brought forth. Paragraph 7 alleges bias in the comment of the court that the case for which the attorney's fees are sought was not complex. Petitioners contend that the case was complex and justifies their application for fees. The correctness of the Court's statement is a matter to be raised on appeal and does not show bias or prejudice of the undersigned judge. Judicial bias is also asserted by affiants in ¶ 8. The attorneys apparently see a bias in the Court's calling for testimony of their part-time bookkeeper relating to Mr. Lyman's testimony. Judges have often utilized their power to call witnesses and one cannot seriously contend that this shows bias. The other basis of alleged judicial bias can be summarized briefly. The Court refused to submit to voir dire questioning by the affiants on said contended bias. So far as this Court is aware, there is no authority for the vior dire of a judge in this situation and such a voir dire would not be a desirable procedure. The Court is said to have taken a "persistent, activist, and inquisitorial role in the proceeding, challenging and cross-examining Petitioners. . . ." As has recently been held in the case of United States vs. Liddy, 16 Cr.L.Rep 2154 (D.C. Cir. 1974), the highest tradition of the judicial function is demonstrated by a judge taking an activist role in matters where questions of honesty are involved. Once again, the nature of this proceeding must be kept in mind. As to charges that the Court has denied efforts by Petitioners to obtain evidence in support of their claims from the files of adverse parties or their counsel, disapproval of court rulings has never been a basis for an allegation of bias. Rea vs. Ford Motor Company, 337 F.Supp. 950 (W. D. Pa., 1972). See United States vs. Grinnell Corp., 384 U.S. 563 (1966). The rulings of the Court with respect to the scope of opposing counsels' cross-examination of Mr. Lyman is also said to show bias. In this allegation, the affiants state that the court has permitted such cross-examination "knowing that the cross-examiner is opposed to Petitioners and counsel in another case and that such information is likely to be sought in bad faith." Although the Court is required to take even the most frivolous allegation as true, judicial evidentiary rulings can only be questioned on appeal.

The contentions of the affiants taken either individually or collectively, do not demonstrate judicial bias. Something more is needed than the mere assertion that the Court has been vigorous in its role as the guardian of the class interest represented by the attorneys in this case. The Court is entitled to characterize evidence in the way that it sees it, especially when its comments are made for the purpose of prompting counsel to come forth with evidence which will support their petition for attorney's fees. The Petitioners would certainly be in a worse position were the court to make no comments at all and completely deny their petition for attorney's fees, leaving the Petitioners the route of direct appeal.

NOW, THEREFORE, IT IS ORDERED THAT:

The motion of Plaintiffs' attorneys that the Court recuse itself from the proceedings in this case is hereby denied.

MUIR,
United States District Judge.

APPENDIX M

Expenses Petition

IN THE UNITED STATES DISTRICT COURT
For the Middle District of Pennsylvania

In the Matter of
GOLDCHIP FUNDING COMPANY
RUTH C. LEIB, et al.,
Plaintiffs,
vs.
20TH CENTURY CORPORATION, et al.,
Defendants.

Civil Action
No. 73-551
Class and Derivative Action

PETITION OF PLAINTIFFS AND PLAINTIFFS' COUNSEL FOR AWARD OF IDENTIFIABLE EXPENSES OF LITIGATION INCURRED BY PLAINTIFFS AND PLAINTIFFS' COUNSEL FROM SEPTEMBER 15, 1973 TO NOVEMBER 29, 1974

Plaintiffs and plaintiffs' counsel hereby pray the Court for an award of identifiable expenses of litigation incurred by plaintiffs and plaintiffs' counsel from September 15, 1973 to

November 29, 1974, in the amount of $10,887.92. An award is sought against Cosmopolitan Investors Funding Company. This Motion is based on the entire record of the action and particularly the Affidavit of Cletus P. Lyman sworn December 2, 1974, attached hereto.

CLETUS P. LYMAN,
Lyman & Ash,
1612 Latimer Street,
Philadelphia, Pa. 19103,

Attorneys for Plaintiffs.

IN THE UNITED STATES DISTRICT COURT
For the Middle District of Pennsylvania

In the Matter of
GOLDCHIP FUNDING COMPANY

RUTH C. LEIB, et al.,
Plaintiffs,

v.

20TH CENTURY CORPORATION, et al.,
Defendants.

Civil Action
No. 73-551
Class and Derivative Action

AFFIDAVIT

State of California } ss
County of Los Angeles }

CLETUS P. LYMAN, Esquire, being duly sworn according to law, deposes and says:

1. I am a member of the Bar of this Court and a member of the law firm of Lyman & Ash, counsel to plaintiffs in the above-captioned action.

2. I make this Affidavit in support of the Petition of Plaintiffs and Plaintiffs' Counsel for an Award of Identifiable

Expenses of Litigation Incurred by Plaintiffs and Plaintiffs' Counsel from September 15, 1973 to November 29, 1974.

3. Plaintiffs' efforts have achieved substantial benefits for Cosmopolitan Investors Funding Company ("Cosmopolitan Funding") including: the quantity of securities to be received by Cosmopolitan Funding in the transaction with 20th Century Corporation ("20th Century"), that is a subject of this litigation is being increased from 260,980 units to 301,489 units; the character of the units is being changed so that the units will be "special preference units" rather than common stock; the "special preference units" have all of the advantages of common stock plus many additional advantages comparable to features of preferred stock or debt securities; 20th Century is paying an additional $15,000 in cash; and, defendant Robert Nelson is paying Cosmopolitan Funding $25,000 in cash, which has already been deposited with an escrow agent.

4. In prosecution of the litigation, plaintiffs' counsel have expended $10,826.91 for identifiable items consisting of notes of testimony, witness fees, travel, long distance telephone calls, paralegal services, printing, mailing, copying (out of office), service of process, dinners for staff (overtime), clerk's fees, copying (in office), mailing services, messengers, clerical services, addressed labels and lunch and dinner with clients. These expenses are more fully set forth on Schedule "A" attached hereto. A summary by nature of expense appears on page 9 of Schedule "A". The only reimbursement received by plaintiffs' counsel thus far from Cosmopolitan Funding is $218.15 as partial payment for costs of Notes of Testimony pursuant to an agreement while the litigation was pending to share certain costs. Plaintiffs' counsel has also received $280.90 in restitution from witnesses who were paid fees but who did not appear at trial. Accordingly, the total expenses to November 29, 1974, by plaintiffs' counsel, less reimbursement, is $10,427.86. Plaintiffs' counsel seeks an award in this amount.

5. Plaintiffs themselves have incurred expenses in travelling to hearings in Williamsport and Lewisburg, Pennsylvania, and, in the case of plaintiff Ruth C. Leib, in travelling to Philadelphia, Wilkes-Barre and Carlisle to participate in hearings, conferences with plaintiffs' counsel, shareholders meetings, and settlement conferences. On information and belief, plaintiffs' expenses of litigation are approximately as follows: Ruth C. Leib, travel, $400.00; Frank B. Leib, travel, $15.00; Andrew Yenchko and Mary K. Yenchko, travel, $45.00. Accordingly, plaintiffs seek an award in aggregate of $460.00 for their expenses of litigation.

6. The expenses referred to above are, to the best of plaintiffs' counsel's knowledge and belief, the only expenses of litigation for which plaintiffs or plaintiffs' counsel are liable to November 29, 1974. There are, however, additional claims being made against plaintiffs' counsel by third parties, including Laventhol Krekstein Horwath & Horwath and Cumberland County National Bank, for services purportedly rendered in connection with the litigation. Plaintiffs and plaintiffs' counsel make this Petition without prejudice to the making of an additional petition or petitions for expenses of litigation in the event that expenses not now known come to light, in the event that claims being made but rejected are ultimately sustained, or in the event that there are further identifiable expenses of litigation incurred by plaintiffs or plaintiffs' counsel. With respect to the last category, it is em-

phasized that the last date of expenses incorporated in this petition is November 29, 1974.

CLETUS P. LYMAN.

Sworn to and subscribed before me this 2nd day of December, 1974.

General Seal,
DIANA F. GRILLI,
Notary Public-California,
Los Angeles County,
My Commission Expires
Feb. 28, 1978.

SCHEDULE OF IDENTIFIABLE EXPENSES OF LITIGATION INCURRED BY PLAINTIFFS' COUNSEL FROM SEPTEMBER 15, 1973 TO NOVEMBER 29, 1974

Date	*Payee/Nature of Expense/Explanation*	
1973		
Sept. 28	C. Lyman/Clerk's Fees/Filing in State and Federal Court	27.50
28	C. Lyman/Travel/Reimbursement of Hotel & Mileage for Travel to Wilkes Barre, Carlisle and Return	17.00
Oct. 3	R. Ash/Travel/Tolls and other out-of-pocket expenses—Travel to Wilkes Barre, Carlisle and return	4.75
23	C. Lyman/Mailing/Reimbursement of postage	3.65
21	U.S. Marshal/Service of Process/Defendants	28.44

Date	*Payee/Nature of Expense/Explanation*	
Dec. 11	District Clerk/Clerk's Fees	33.50
7	Postal Instant Press/Copying	3.18
10	Jenkins Law Library/Copying/Research	3.60
11	Cash/Mailing/Misc. Postage	16.00
11	R. Ash/Copying/Reimbursement of out-of-pocket copying (Research)	4.50
11	R. Ash/Dinner for Staff (O.T.)/Reimbursement	5.37
12	R. Ash/Travel/To Williamsport for Hearing	50.00
17	R. Ash/Travel/To Williamsport for Hearing	9.84
21	C. Lyman/Clerk's Fee/Deposition Subpoena	1.00
21	R. Ash/Copying/Reimbursement	4.30
22	R. Ash/Copying/Reimbursement for legal research copying	5.90
22	R. Ash/Copying/Reimbursement for legal research copying	2.22
1974		
Jan. 7	R. Ash/Copying/Reimbursement for legal research copying	4.40
7	R. Ash/Mailing/Reimbursement	7.06
16	U. S. Marshal/Service of Process/Defendants	7.44
21	R. Ash/Mailing/Postage	7.50
25	Leasco Information Products/Copying/SEC documents	3.90
30	R. Ash/Travel/To Harrisburg	15.00
31	R. Ash/Travel/To Williamsport on Preliminary Injunction (2nd)	50.00
Feb. 19	R. Ash/Mailing/Reimbursement of Postage	4.70
20	R. Ash/Copying/Reimbursement for legal research copying	3.40

Date		*Payee/Nature of Expense/Explanation*	
Apr.	5	Replica I/Copying	1.73
	8	N. Cobbs/Paralegal Services/Legal Research Review of Documents in Harrisburg including travel and out-of-pocket expenses	186.50
	16	District Clerk/Clerk's fee	9.00
	16	J. Sadden/Clerical Services/Copying of documents at McNees, Wallace & Nurick	25.00
	19	Official Court Reporters/Notes of Testimony/Sherno Deposition	204.40
	24	A. Plesce/Notes of Testimony/Preliminary Injunction Hearing	70.70
	29	District Clerk/Clerk's Fee/Notice of Appeal	5.00
May	6	Cosmopolitan Funding/Addressed Labels/Shareholder Mailing	85.00
	8	Official Court Reporters/Notes of Testimony/Nelson Deposition No. 1	324.60
June	4	C. Lyman/Travel/to Harrisburg & Return Inspection of Documents	11.21
	7	Circuit Clerk/Clerk's Fee/Docketing Appeal	50.00
	7	Mohrbach & Marshall/Notes of Testimony/Spangler Deposition	242.50
	12	Cash/Travel/Taxis	6.85
	13	Huggins & Co./Witness Fee/Deposition	21.00
	13	District Clerk/Clerk's Fee/Deposition Subpoena	1.00
	18	Cash/Mailing/Postage	5.00
	20	Philadelphia Postmaster/Mailing/Shareholder Notice	532.60
	20	Quick Messenger/Messenger/Delivery of Postmaster Check	4.00
	21	Philadelphia Postmaster/Mailing/Shareholder Notice	23.30

Date		*Payee/Nature of Expense/Explanation*	
	25	Leon Segal Co./Printing/Typesetting for Shareholder Notice	200.00
	25	District Clerk/Clerk's Fee/Copying Docket	10.00
	25	Printers Place/Copying/Copying motion to file second amended complaint and miscellaneous	16.00
	26	C. Lyman/Travel/To Washington and Return	30.35
	25	M. Dorian/Paralegal services/Review of Documents at SEC	73.60
July	1	Cash/Dinners for Staff (O.T.)	52.50
	1	M. Dorian/Paralegal services/2.2 hrs.	11.00
	1	Perfect Mailing Services/Mailing Services/Shareholder Notice	105.70
	3	Quick Messenger/Messenger	5.00
	4	Lickety Split/Dinners for Staff (O.T.)	34.10
	9	R. Fox/Witness Fee/Deposition	21.00
	10	U. S. Marshal/Service of Process/Defendants	53.84
	11	M. Dorian/Paralegal Services/29 hours	145.00
	18	R. Ash/Travel/Trips to Harrisburg, Washington, and Harrisburg	136.05
	18	M. Dorian/Paralegal Services/31 hours	155.00
	22	Happy Rooster/Dinners for staff (O.T.)	16.50
	21	Carte Blanche/Travel/Trip to Harrisburg	18.23
	24	C. Lyman/Travel/To Washington & Return	21.35
	27	M. Dinter/Notes of Testimony/Lyons and D'Ginto Depositions	264.60
	27	C. Lyman/Travel/To Harrisburg & Return	23.75
	27	R. Ash/Mailing/Postage	6.36
	29	Holiday Inn/Travel/To Lewisburg for Pretrial Conference	14.84

Date	*Payee/Nature of Expense/Explanation*	
29	Allegheny Airlines/Travel/Return from Lewisburg	27.64
29	C. Lyman/Travel/Lunch, Airport Bus & Turnpike Toll	6.22
29	R. Ash/Travel/To Harrisburg for Pretrial Conference of Counsel and Return	22.40
Aug. 2	M. Dorian/Paralegal Services/21.75 hrs. plus out-of-pocket expenses	109.95
5	Official Court Reporters/Notes of Testimony/Depositions of Turberg and Robertson	122.25
5	M. Dinter/Notes of Testimony/Depositions of Jacobs, Murphy and DiStefano	291.90
6	Quick Messenger/Messenger/Delivery of documents to expert witness (M. Conn)	12.72
13	Richard Fox/Witness Fee/Trial	40.00
13	Leonard Terry/Witness Fee/Trial	35.00
13	Riverside Electric/Witness Fee/Trial	35.00
13	Lawrence Millwork/Witness Fee/Trial	36.00
13	James Robson/Witness Fee/Trial	35.00
13	Joseph McCormick/Witness Fee/Trial	36.00
13	H. Colvin/Witness Fee/Trial	36.00
13	Cumberland Co. Bank/Witness Fee/Trial	35.00
13	V. Jones/Witness Fee/Trial	36.00
13	H. Keefe/Witness Fee/Trial	40.00
13	K. Smith/Witness Fee/Trial	35.00
13	J. Cohen/Witness Fee/Trial	50.00
13	York County Sheriff/Service of Process/Subpoena	10.00
15	Monroe Security Bank/Witness Fee/Trial	50.00
15	Northeastern National Bank/Witness Fee/Trial	50.00
19	McNees, Wallace & Nurick/Copying/Discovery Documents	10.00
19	Monroe County Sheriff/Service of Process/Subpoena	11.75

Date	*Payee/Nature of Expense/Explanation*	
20	John Plesic/Witness Fee/Trial	34.00
20	K. Mutzel/Witness Fee/Trial	34.00
20	J. Cino/Witness Fee/Trial	55.60
25	The Garden/Lunch with Clients	18.50
26	The Garden/Dinners for Staff (O.T.)	25.00
27	Mohrbach & Marshall/Notes of Testimony/Rosenberger Deposition	204.60
27	York County Sheriff/Service of Process/Subpoenas	10.91
27	Quick Messengers/Messenger	4.00
27	Frog Restaurant/Dinners for Staff (O.T.)	22.00
29	Holiday Inn/Travel/To Danville for trial at Lewisburg	39.22
30	Sheraton Motor Inn/Travel/Rooms and meals including for trial assistant and witness	124.52
30	J. Cino/Witness Fee/Trial	30.00
30	Cobblestones Restaurant/Dinners for Staff (O.T.)	23.00
31	Budget Rent A Car/Travel/To Lewisburg for Trial	51.98
Sept. 2	Monroe County Sheriff/Service of Process/Subpoena	14.75
2	Mohrbach & Marshall/Notes of Testimony/Deposition J. Plesic	110.05
5	University Motor Inn/Travel/Rooms for Counsel and Witnesses	122.38
5	Temperance House/Dinner with Clients/Post trial	14.50
7	Budget Rent A Car/Travel/To Lewisburg and return for trial	72.16
9	Mohrbach & Marshall/Notes of Testimony/Shillingsford Deposition	133.30
15	U. S. Marshal/Service of Process/Subpoenas	37.80

Date	*Payee/Nature of Expense/Explanation*	
15	Lewis Darlin/Witness Fee/Trial	86.55
15	Xerocenter/Copying/5306 sheets for appendix	217.18
16	Printers Place/Printing/Notice to Shareholders	484.42
17	R. Ash/Travel/To York & Harrisburg for Fox deposition & Pretrial conference of counsel including train, taxi & Hotel (8/22 trip)	40.60
17	R. Ash/Travel to Harrisburg, including hotel (8/26 trip)	71.94
28	Carte Blanche/Travel/Misc. Travel by C. Lyman reflected in August & Sept. statements	112.70
12	D. Rome/Paralegal Services/Assistance at Trial 8/29-8/30	100.00
Oct. 19	Off. Ct. Rep./Notes of Testimony/Nelson deposition No. 2	231.00
23	Printers Place/Copying/Pretrial documents	201.17
Nov. 4	Master Charge/Travel/Misc. Travel by C. Lyman reflected on September statement	68.16
18	Lycoming Hotel/Lunch with clients/Recess of Settlement Hearing	22.28
22	Circuit Clerk/Clerk's Fee/Slip Opinion	1.00
22	Printers Place/Copying/Settlement Documents	13.00
27	U. S. Marshal/Service of Process/Deposition Subpoenas	4.00
18	Sheraton Motor Inn/Travel/Rooms for Counsel, trial assistant and witness	62.82
Payable	Official Court Reporters/Notes of Testimony/Deposition of Robert DiStefano	170.80
	Mohrbach & Marshal/Notes of Testimony/Fox Deposition	299.88

Date	*Payee/Nature of Expense/Explanation*	
	Knipes-Cohen/Notes of Testimony/Nelson Deposition No. 3	268.93
	The Pennsylvania Group/Witness Fee/Expert Witness, Michael K. Conn, consultation over 11-month period from 12/73 to 11/74; attendance at court in Lewisburg on September 4 and September 5, and attendance at court in Williamsport November 18, 1974; travel expenses and miscellaneous expenses including motel	1,480.01
	Cumberland County Bank/Witness Fee/Deposition including copying expenses	67.00
	Alina Radziejowska/Printing/Graphic Design of Notice to Shareholders	50.00

Appendix M—Expenses Petition.

Long Distance Telephone Calls

Calls to counsel, courts, clients, class members, public agencies, witnesses, informants, prospective witnesses, marshals, sheriffs, banks, accountants, etc.

1973	
October	10.09
November	46.99
December	22.23
1974	
January	34.55
February	27.46
March	11.64
April	12.22
May/June	51.88
July/Aug.	252.56
Sept.	206.69
Oct.	25.22
Nov.	29.50
Surcharge and taxes (16% of above)	116.96

Date	*In Office Copying*	*Amount*
Sept. 15, 1973 through Nov. 29, 1974	In addition to copying reflected above, purchased from commercial copy services, it is estimated that Lyman & Ash made no less than 3,000 copies on its in-office copy machine. These copies have a cost of approximately 5¢ each.	150.00

APPENDIX N

Petition of Plaintiffs' Counsel For Award of Counsel Fees

UNITED STATES DISTRICT COURT
For the Middle District
of Pennsylvania

In The Matter Of:

GOLDCHIP FUNDING COMPANY and
COSMOPOLITAN INVESTORS FUNDING
COMPANY,

RUTH C. LEIB, et al.,
Plaintiffs,

v.

20TH CENTURY CORPORATION, et al.,
Defendants.

Civil No. 73-551

Lyman & Ash, counsel to plaintiffs in the above consolidated action, hereby prays the Court for an award of counsel fees for services rendered in prosecuting this action from September 15, 1973 to November 14, 1974, in the amount of $75,000. An award is sought against Cosmopolitan Investors Funding Company. This motion is based on the entire record of the action, and particularly the Affidavit of Richard A.

Ash, Esq. and Cletus P. Lyman, Esq., sworn November 18, 1974 attached hereto.

CLETUS P. LYMAN,
Cletus P. Lyman,
LYMAN & ASH,
1612 Latimer Street,
Philadelphia, Pennsylvania,
Attorney for Plaintiffs.

Affidavit

UNITED STATES DISTRICT COURT
For the Middle District
of Pennsylvania

In The Matter Of:

GOLDCHIP FUNDING COMPANY and
COSMOPOLITAN INVESTORS
FUNDING COMPANY,

RUTH C. LEIB, et al.,
Plaintiffs,

v.

20TH CENTURY CORPORATION, et al.,
Defendants.

Civil No. 73-551.

Commonwealth of Pennsylvania,
County of Lycoming. } ss.:

Richard A. Ash, Esquire and Cletus P. Lyman, Esquire, being duly sworn according to law, depose and say:

1. We are members of the law firm of Lyman & Ash, counsel to plaintiffs in the above-captioned action.

2. We make this affidavit in support of the Petition of Plaintiffs' Counsel for an Award of Counsel Fees for services rendered in the above-captioned consolidated action, for the period from September 15, 1973 to November 14, 1974.

3. It is well settled that counsel for representative plaintiffs in a class action or derivative action who have benefited a corporation or the shareholders of a corporation are entitled to an award of counsel fees from the corporate treasury. *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970); Fletcher Cyc. Corp. (Perm. Ed. 1970) Volume 13 § 6045.

4. Plaintiffs' efforts have achieved substantial benefits for Cosmopolitan Investors Funding Company (Cosmopolitan Funding) which benefits are set forth elsewhere of record, including in the Affidavit of Cletus P. Lyman, Esq. in support of the petition of plaintiffs and plaintiffs' counsel for award of identifiable expenses of litigation at paragraph 4.

5. Richard A. Ash, Esq. has spent 599.8 identifiable hours in prosecuting the above action from September 15, 1973 to November 14, 1974. The dates when services were rendered, the nature of the services rendered and the hours spent on each date are set forth on Schedule A, which is incorporated herein by reference.

6. Cletus P. Lyman, Esq. has spent 674.4 identifiable hours in prosecuting the above action from September 15, 1973 to November 14, 1974. The dates when services were rendered, the nature of services rendered and the hours spent on each date are set forth on Schedule B, which is incorporated herein by reference.

7. The total of identifiable hours is less than the total of hours spent in prosecuting litigation, because hours spent rendering services of the following nature are not identifiable: brief discussions between ourselves; the writing of routine correspondence; the reading of incoming correspondence, pleadings, motion papers, briefs and opinions; the routine incoming and outgoing telephone calls; delays in making train and airplane connections; and non working hours necessarily expended in overnight trips.

8. Our files contain 211 outgoing letters, including letters to other counsel, to the Court, to our clients, to witnesses, to public agencies, and to members of classes of shareholders. Our records reflect $802.06 in outgoing toll calls, suggesting about 100 hours of calling time. In addition, time was spent on incoming toll calls and outgoing and incoming local calls. We have taken 26 trips, including a number of overnight trips.

9. Based on paragraphs 7 and 8 above, we believe hours spent in prosecuting the litigation are 125% of identifiable hours spent. Accordingly, we claim that Richard A. Ash, Esq. has spent 749.75 hours in prosecuting the litigation during the period and that Cletus P. Lyman, Esq. has spent 843 hours prosecuting the litigation during the period.

10. In addition to time spent by attorneys approximately 140 hours were spent by paralegal personnel in review of documents and in preparation of documents for trial and on appeal.

11. Counsel for plaintiffs have financed this litigation by advancing expenses as set forth in the Affidavit of Cletus P.

Lyman, Esq. in support of the petition of plaintiffs and plaintiffs' counsel for award of identifiable expenses of this litigation. Of the total expenses to November 11, 1974 less reimbursement of expenses received, the sum of $11,193.71, $500 was advanced by plaintiffs and the balance was either advanced or is guaranteed payable by plaintiffs' counsel.

12. Identifiable expenses of litigation do not include all expenses incurred by plaintiffs' counsel. Among expenses excluded are a fair portion of rent, utilities, stationery and clerical personnel.

13. As is customary in representative actions the named plaintiffs have not undertaken to pay counsel fees and the only counsel fees which will be paid to plaintiffs' counsel are those awarded by the Court. Counsel for plaintiffs assumed the risk that they would receive no payment of fees if they were unsuccessful in achieving a benefit for the corporations or their shareholders.

14. The general fair hourly billing for noncontingent services of Cletus P. Lyman, Esq., is no less than $50 per hour. We believe Mr. Lyman has skill in actions of this kind, having had 3 years of experience in this area of practice, and that his fair hourly billing rate for this kind of action is higher than his general fair hourly billing rate.

15. The general fair hourly billing rate for noncontingent services of Richard A. Ash, Esq., is no less than $60 per hour. We believe Mr. Ash has skill in actions of this kind, having had 4 years of experience in this area of practice, and that his fair hourly billing rate for this kind of action is higher than his general fair hourly billing rate.

16. In addition to the measurable economic benefits achieved, these consolidated actions have brought about the following intangible benefits:

(a) The management of Cosmopolitan Funding has been called to account for the enormous losses sustained over the period from 1967 to 1973. Shareholders, in their communications to counsel for plaintiffs, have indicated satisfaction that an inquiry was being made for its own sake.

(b) Management of 20th Century Corp. has been called to account for its questionable dealings with Cosmopolitan Funding. This has had a prophylactic effect extending to future relations between 20th Century management and Cosmopolitan Funding shareholders.

(c) Congressional and Pennsylvania policies of enforcement of securities laws and other corporate laws, particularly those dealing with fiduciary duties, have been implemented.

/s/ RICHARD A. ASH,
Richard A. Ash,

/s/ CLETUS P. LYMAN,
Cletus P. Lyman.

Sworn and Subscribded to Before me this 18th day of November, 1974.

/s/ SYLVIA L. LONG,
Notary Public.

SCHEDULE OF IDENTIFIABLE HOURS EXPENDED BY RICHARD A. ASH, ESQ. IN PROSECUTING LITIGATION FROM SEPTEMBER 15, 1973 TO NOVEMBER 14, 1974

Date	*Nature of Services Rendered*	*Hours Spent*
1973		
Sept. 18	Meeting with client	2.0
18-24	Review of proxy statement and client's file, preparation of Complaint, conversations with client, and representatives of 20th Century and Cosmopolitan Funding	20.0
26	Preparation of Complaint	2.0
	Preparation for Hearing in State Court	2.0
27	Travel to Wilkes Barre	2.5
	Hearing in State Court	1.2
	Conferences with client, defendants, Hon. Michael Sheridan and personnel of Federal Court	5.0
	Travel to Lewisburg	1.5
	Hearing on T.R.O.	0.8
	Travel to Carlisle	1.8
	Attendance at Goldchip Shareholders Meeting	1.0
	Conferences with client, and Goldchip Stockholders	2.0
28	Conferences with client and shareholders	1.5
	Attendance at Cosmopolitan Funding Meeting	1.0
	Travel from Carlisle to Philadelphia	2.5
Oct. 21	Research on memo in support of preliminary injunction motion	5.0
Nov. 15*	Conference with Goldchip shareholder	4.0

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* Approximate date.

Date	*Nature of Services Rendered*	*Hours Spent*
Dec. 4	Conference of counsel on pretrial discovery matters	4.0
12	Preparation of memorandum in support of class action motion	8.0
13	Preparation for class action hearing	4.0
	Preparation of motion for preliminary injunction (2nd)	5.0
14	Travel to Williamsport	2.0
	Preparation for class action hearing and hearing	6.5
	Return travel	2.0
18	Conference of counsel on pretrial matters	4.0
20*	Visit to Philadelphia SEC Office	2.0
21*	Preparation of reply memorandum in support of class action motion	4.0
22*	Preparation of memorandum on propriety of 2nd preliminary injunction motion	8.0
1974		
Jan. 3	Attendance at Stanley Sherno deposition	4.5
5	Preparation of letter of demand upon Cosmopolitan Funding Directors	5.0
7	Preparation of supplemental and reply memo re 2nd preliminary injunction motion	4.0
8	Preparation of supplemental and reply memo re 2nd preliminary injunction motion	8.0
10	Attendance at Robert Nelson deposition	9.3
15*	Travel to Washington	3.0
	Research at SEC	3.0
	Conference with associate general counsel and staff members of SEC	2.0
	Return travel	3.0

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* Approximate date.

Date	*Nature of Services Rendered*	*Hours Spent*
18	Settlement conference with counsel	3.0
29	Travel to Harrisburg	2.2
	Meeting with directors of Cosmopolitan Funding and interview with James C. Robertson (his counsel present)	4.0
	Return travel	2.2
31	Travel to Williamsport	4.0
Feb. 1	Hearing on 2nd motion for preliminary injunction, including luncheon conference	6.0
	Return travel	4.0
8	Preparation of proposed findings of fact and conclusions of law re 2nd preliminary injunction motion	9.0
9	Preparation of proposed findings of fact and conclusions of law re 2nd preliminary injunction motion	1.0
21	Preparation of 2nd supplemental memorandum re 2nd preliminary injunction motion	3.0
26	Preparation for hearing on 2nd class action motion	1.0
Mar. 14	Settlement conference with counsel and clients present	6.5
	Conference with clients	1.5
28	Appointment with representatives of SEC (in office) Lunch afterwards	2.5
Apr. 29	Participation in drafting notice to shareholders	0.5
May 13*	Settlement conference with counsel and James C. Robertson	3.0
June 6	Appointment with postal inspector (in office)	1.0

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* Approximate date.

Date	*Nature of Services Rendered*	*Hours Spent*
24	Conference with Cosmopolitan Funding counsel	3.0
28	Telephone conference with shareholder	0.2
24	Conference with Mr. Lyman	1.0
30	Conference with Mr. Lyman	1.0
July 1	Conference with Mr. Lyman and Mr. Dorian	2.0
2	Review of Nelson settlement papers	0.3
8	Conference with Mr. Lyman	0.5
	Travel to Harrisburg	2.2
	Obtain subpoena and review documents	7.0
9	Review documents in Harrisburg and interview of informants	9.0
10	Review documents and interview informants in Harrisburg	9.0
	Travel to Philadelphia	2.2
11	Travel to Washington to SEC	2.5
	Review documents at SEC	6.0
	Return travel	2.5
11	Conference with Mr. Lyman	1.5
	Prepare for Nelson deposition	1.0
July 12	Prepare for Nelson deposition	7.0
	Attendance at Nelson deposition	5.5
14	Conference with Mr. Lyman	2.0
	Prepare for Rosenberger deposition	2.0
15	Travel to Harrisburg	2.2
	Attendance at Rosenberger deposition	4.0
	Return to Philadelphia	2.2
18	Locate expert witness	2.0
19	Locate expert witness	2.0
	Telephone conference call with witness in Stroudsburg	0.7
20	Misc. telephone calls	1.8

Date	*Nature of Services Rendered*	*Hours Spent*
21	Preparation of motion for continuance	3.0
22	Prepare for Richard Fox deposition	6.0
	Travel to York	3.0
23	Attend Fox deposition	6.0
	Travel to Harrisburg	0.5
	Pretrial conference with counsel	2.0
	Return to Philadelphia	2.2
24	General preparation for trial	6.0
26	Travel to Harrisburg	2.2
	Pretrial conference with counsel	6.8
	Return to Philadelphia	2.2
27	Conference with Mr. Lyman	3.0
	General preparation for trial	3.0
28	Preparation of pretrial documents	10.0
30	Prepare for Shillingford deposition	7.0
31	Travel to Harrisburg	2.2
	Attend Shillingford deposition	4.5
	Review documents	2.0
	Conference with informant	3.0
Aug. 1	Review documents at warehouse	5.0
	Conference with informant	2.0
	Telephone conference with Mr. Lyman	0.5
2	Review documents at warehouse	5.0
	Review documents at McNees	2.0
	Return to Philadelphia	2.2
3	Review documents	3.0
4	Review documents and prepare for Nelson deposition	15.0
5	Attend deposition of Nelson	6.5
6	Study documents	7.0
7	Trial preparation	8.0
8	Trial preparation	8.0
9	Conference with SEC representative	4.0
11	Prepare for trial and telephone conferences with witnesses	12.0

Date	*Nature of Services Rendered*	*Hours Spent*
12*	Research	2.0
	Study documents	2.0
	Conference with Mr. Albert	1.0
	Conference with Mr. Lyman	2.0
13	Prepare exhibit listings and findings of fact	2.0
16	Meeting with expert	4.5
	Conference with Mr. Lyman	1.0
19	Calls to witnesses	1.0
20	Misc. calls	0.5
	Conference with Mr. Lyman	2.0
21	Misc. calls	0.7
	Review records	8.0
22	Travel to Stroudsburg	3.0
	Interview Mr. Sherno's bankers and accountant	5.0
23	Review bank records	3.0
	Return to Philadelphia	3.0
24	Review documents	4.0
25	Prepare proposed stipulation of facts regarding Stanley Sherno	5.0
26	Telephone calls	1.5
	Preparation for trial	6.0
27	Preparation for trial	8.0
28	Preparation for trial and telephone calls	8.0
	Travel to Lewisburg	3.5
29	Travel to court and return	1.0
	Preparation for trial, trial and recess conferences	7.0
	Conference with witness	1.0
30	Preparation for trial, trial and recess conferences	7.5
	Travel from Lewisburg to Philadelphia	4.0
31	Conference with Mr. Lyman	3.0

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* Approximate date.

Date	*Nature of Services Rendered*	*Hours Spent*
Sept. 1	Conference with Mr. Lyman	3.0
	Review and prepare for trial	1.0
2	Prepare for Trial	8.0
	Travel to Lewisburg	4.0
3	Trial including preparation and recess conferences	7.0
	Conference with Mr. Lyman	2.0
	Conference with Lewis Darlin, Esq.	1.5
4	Trial	2.0
	Conference with Lewis Darlin, Esq.	1.0
	Settlement conferences	5.0
5	Trial	0.5
	Settlement conferences	3.5
	Hearing on settlement	2.0
	Conference with clients	1.0
	Return travel to Philadelphia	3.5
16	Settlement conference	5.7
17	Settlement conference (tel.)	0.5
Oct. 17[*]	Conference with client re settlement	2.0
Nov. 12	Review of petition for award of expenses in litigation	0.5
14	Preparation of petition for counsel fees	7.0
	Review of documents in support of settlement	0.3

TOTAL IDENTIFIABLE HOURS SPENT
BY RICHARD A. ASH, ESQ. 599.8

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[*] Approximate date.

SCHEDULE OF IDENTIFIABLE HOURS EXPENDED BY CLETUS P. LYMAN, ESQ. IN PROSECUTING LITIGATION FROM SEPTEMBER 15, 1973 TO NOVEMBER 14, 1974

Date	*Nature of Services Rendered*	*Hours Spent*
1973		
Sept. 15	Call from client about receipt of proxy solicitation	.5
18	Conference with client	2.0
18-24	Review of proxy statement and client's file, preparation of Complaint, conversations with client, and representatives of 20th Century and Cosmopolitan Funding	15.0
25	Preparation, filing of state court complaint, making of motion for rule to show cause and arrangements for service of process	4.0
26	Preparation of federal court complaint	4.0
	Preparation for hearing in state court	2.0
27	Travel to Wilkes Barre	2.5
	Hearing in State Court	1.2
	Conferences with client, defendants, Hon. Michael Sheridan and personnel of Federal Court	5.0
	Travel to Lewisburg	1.5
	Hearing on T.R.O.	0.8
	Travel to Carlisle	1.8
	Attendance at Goldchip Shareholders Meeting	1.0
	Conferences with client, and Goldchip stockholders	2.0
28	Conferences with client and shareholders	1.5
	Attendance at Cosmopolitan Funding Meeting	1.0
	Travel from Carlisle to Philadelphia	2.5

Date	*Nature of Services Rendered*	*Hours Spent*
Oct. 10	Preparation of memorandum in support of preliminary injunction motion, proposed findings of fact and conclusions of law	4.0
	Travel to Lewisburg	1.5
	Travel to Harrisburg	1.5
	Conference with Messrs. Pera and Jamouneau	3.0
11	Travel to Lewisburg	1.5
	Hearing at Lewisburg	0.8
	Travel to Philadelphia	4.0
21	Preparation of request for alias summons no. 1 and marshal's service forms	0.5
	Preparation of amended complaint	3.0
23	Preparation of supplemental memorandum re preliminary injunction	5.0
	Preparation of request for answers to interrogatories sets 1 and 2, request for production of documents no. 1 and notice of Sherno deposition	2.5
Nov. 2*	Preparation of request for production of documents nos. 2 and 3	1.0
15*	Conference with Goldchip shareholder	4.0
30	Preparation of request for production of documents no. 4	.5
Dec. 4	Conference of counsel on pretrial discovery matters	4.0
12	Preparation of memorandum in support of class action motion	7.0
21*	Preparation of reply memorandum in support of class action motion	7.0
26	Preparation of Yenchko intervention motion papers	5.0

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* Approximate date

Date	*Nature of Services Rendered*	*Hours Spent*
31	Meeting with clients	1.5
	Filing of intervention motion, travel to and from court house	1.5
1974		
Jan. 3	Attendance at Stanley Sherno deposition	4.5
8	Preparation of supplemental and reply memo re 2nd preliminary injunction motion	3.0
7	Travel to Harrisburg	2.2
	Attendance at Allen Spangler deposition	7.0
	Dinner with defense counsel	1.5
	Return to Philadelphia	3.0
8	Preparation of document request no. 5	.5
Jan. 10	Attendance at Robert Nelson deposition	9.3
Feb. 18	Travel to Hazleton	2.3
	Conference with clients	3.0
19	Travel to Williamsport	1.5
	Hearing on 2nd class action motion	3.0
	Return to Hazleton	1.5
	Dinner with clients	2.0
20	Travel to Philadelphia	2.5
26	Preparation for class action hearing	1.0
27	Travel to Harrisburg	2.2
	Review of documents at Laventhol Krekstein Horwath & Horwath	5.0
28	Conference and travel with Mr. Jamouneau	2.5
	Conference with clients	1.0
	Hearing	1.5
	Return travel to Philadelphia	4.0
Mar. 5	Memorandum in support of 2nd class action motion	4.0
14	Settlement conference with counsel and clients present	6.5
	Conference with clients	1.5

Date	*Nature of Services Rendered*	*Hours Spent*
20	Preparation of 2nd memorandum in support of 2nd class action motion	7.0
28	Appointment with representatives of SEC (in office) Lunch afterwards	2.5
Apr. 4	Preparation of papers to compel production of documents	2.0
5	Conference with Mr. Greenberg, obtaining agreement to produce documents	0.5
12	Preparation of proposed form of order supplementing class action determination per direction of court	1.5
29	Drafting notice to shareholders	3.0
May 6	Meeting of counsel re class action notice and other matters	1.5
8	Preparation of motion for reconsideration of denial of preliminary injunction	2.0
1*	Travel to Harrisburg	2.2
	Review of documents at 20th Century Corp.	3.0
	Return to Philadelphia	2.2
13*	Settlement conference with counsel and James C. Robertson	3.0
May 23 through June 21	Supervision of printing and mailing of notice to shareholders	4.0
May 27	Preparation of memorandum in support of motion for reconsideration of preliminary injunction denial	4.0
June 6	Travel to Camp Hill	2.5
	Inspection of documents at 20th Century Corp.	5.0
	Return to Philadelphia	2.2

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* Approximate date

Date	*Nature of Services Rendered*	*Hours Spent*
14	Preparation of praecipe for alias summons no. 2 and marshal's forms	0.3
24	Travel to Washington	2.5
	Inspection of documents at SEC	4.0
	Return travel	3.0
	Conference with Mr. Ash	1.0
25	Meeting with Mr. Albert	2.0
	Misc. telephone calls	0.5
	Appeal papers	2.0
26	Telephone calls and correspondence	1.5
27	Preparation of Amendments to Complaint	1.5
	Further preparation of Amendments	0.5
28	Preparation of Appendix on appeal	1.0
30	Legal research	3.5
	Conference with Mr. Ash	1.0
July 1	Conferences with Mr. Ash and Mr. Dorian	2.0
	Review of documents	7.5
2	Deposition of Bennett Lyons including preparation	8.0
	Preparation of papers re Nelson settlement	2.0
3	Deposition of Steven Jacobs, including preparation	7.0
4	Preparation of papers re discovery including motions	3.0
5	Deposition of John D'Ginto including preparation	4.5
6	Meeting with Huggins & Co.	0.5
14	Conference with Mr. Ash	2.0
9	Deposition of Robert DiStefano including preparation	7.5
	Answers to shareholders correspondence and telephone calls	1.5

Date	*Nature of Services Rendered*	*Hours Spent*
8	Deposition of Robert DiStefano	3.0
	Conference with Mr. Ash	0.5
	Deposition of A. C. Murphy including preparation	5.0
10	DiStefano deposition including preparation	6.0
	Preparation of future depositions	3.0
11	Huggins deposition including preparation	5.0
	Review of documents	2.0
	Conference with Mr. Ash	1.5
12	Attendance at continuation of Robert Nelson deposition	0.5
14	Preparation of discovery and responses to discovery	4.5
15	Deposition of James C. Robertson including preparation	5.5
17	Motion to take LKHH deposition late	2.5
	Research re continuance	1.5
	Misc. telephone calls	0.5
	Review of entire file	8.0
	Preparation of motion for continuance	3.0
18	Preparation of exhibits for trial	5.0
	Conference with Messrs. Bechtle and Jamouneau	1.5
19	Preparation of documents for trial	8.0
20	Telephone conferences with witnesses, further preparation of documents and research on continuance	6.0
21	Preparation of brief on appeal	2.0
	Preparation of motion on continuance	5.0
	Telephone conferences with witnesses	1.0
	Review of documents	2.5
22	Preparation of pre-trial documents	12.0
	Preparation of brief on appeal	1.0

Date	*Nature of Services Rendered*	*Hours Spent*
24	Travel to Washington	2.0
	Review of documents at SEC	2.5
	Return travel	2.0
	Misc. telephone calls	1.0
	Brief on appeal	1.0
	Preparation of more definite statement	1.0
25	Deposition of LKHH including travel time to Harrisburg	8.0
26	Travel to Philadelphia	2.2
	Pre-trial conference of counsel	6.8
27	Conference with Mr. Ash	3.0
28	Preparation of pre-trial documents including affidavit re continuance	4.5
	Travel to Lewisburg	4.0
29	Pre-trial conference with court	1.2
	Return travel	5.3
30	Misc. correspondence and telephone calls	4.0
Aug. 1	Conference with Mr. Ash (tel.)	0.5
	Conference with Mr. Bechtle	1.5
12	Conference with Mr. Ash	2.0
4	Motion to further amend complaint	4.0
5	Preparation of documents for expert witness	2.0
	Correspondence	2.0
6	Preparation of documents for expert witness	1.0
	Preparation of motion to further amend complaint	2.0
7	Preparation of motion to further amend complaint	2.5
	Preparation of expense records for Mr. Albert	0.5
9	Misc. correspondence and telephone calls	1.0
10	Preparation of trial brief	4.0

Date	*Nature of Services Rendered*	*Hours Spent*
11	Preparation of trial brief	1.5
	Preparation of proposed findings of fact	4.0
	Preparation of subpoenas	1.0
12	Preparation of motion to compel answers to interrogatories	1.5
	Preparation of trial brief	6.0
	Preparation of subpoenas	1.0
13	Preparation of exhibit listings	0.5
	Preparation of proposed findings of fact	6.0
	Misc. correspondence	2.0
	Preparation of trial brief	2.0
	Preparation of motion to compel documents	1.0
14	Preparation of proposed findings of fact conclusions of law and other pre-trial documents	13.0
15	Preparation of proposed findings of fact	2.5
	Preparation of trial brief	4.0
	Settlement conference (Nelson)	1.5
16	Telephone calls re settlement	2.0
	Conference with expert witness	4.5
18	Review of defendant's brief and other pre-trial documents	1.0
	Work on settlement agreement	2.0
19	Misc. telephone calls	0.5
20	Preparation of additional proposed findings of fact and conclusions of law	4.0
	Conference with Mr. Ash	2.0
21	Preparation of additional findings of fact and exhibits	2.0
22	Telephone calls	0.5
	Preparation of additional proposed findings of fact	0.5
23	Conference with Mr. Bechtle	1.5

Date	*Nature of Services Rendered*	*Hours Spent*
25	Preparation of digest of depositions	2.0
26	Telephone conferences with witnesses	2.0
	Review of findings of fact	3.0
	Calls to counsel	1.0
	Preparation of notice to shareholders and motion re Nelson settlement	4.0
27	Review of evidence	8.0
28	Review of evidence and preparation thereof for trial	10.0
	Travel to Lewisburg	3.5
	Preparation for trial, trial and recess conferences	7.0
	Conference with witness	1.0
30	Preparation for trial, trial and recess conferences	7.5
	Travel from Lewisburg to Philadelphia	4.0
31	Conference with Mr. Ash	3.0
Sept. 1	Conference with Mr. Ash	3.0
2	Reading of depositions	2.0
	Travel to Lewisburg	4.0
3	Trial including preparation and recess conferences	7.0
	Conference with Mr. Ash	2.0
	Conference with Lewis Darlin, Esq.	1.5
4	Trial	2.0
	Conference with Lewis Darlin, Esq.	1.0
	Settlement conference	11.5
5	Trial	0.5
	Settlement conference	3.5
	Hearing on settlement	2.0
	Conference with clients	1.0
12	Conference with SEC	0.5
16	Settlement conference	5.7
17	Settlement conference	1.0

Date	*Nature of Services Rendered*	*Hours Spent*
20	Review of settlement documents with clients	2.5
18	Telephone conference with Mr. Pera	0.5
28	Preparation of petition for expenses	1.0
Oct. 10	Telephone conference with Mr. Pera	0.2
Nov. 3	Notices of depositions	1.0
11	Preparation of petition for award of expenses of litigation	5.0
12	Preparation of petition for award of expenses of litigation	4.0
13	Preparation of affidavit and memorandum in support of settlement	4.0
14	Preparation of petition for counsel fees	10.5
	Preparation of affidavit and memorandum in support of settlement	1.5
Sept. 5	Return travel to Philadelphia	3.5

TOTAL IDENTIFIABLE HOURS SPENT
BY CLETUS P. LYMAN, ESQ. 674.4